DOCKET

No. 86-1908-CFX
Status: GRANTED

Title: Stewart Organization, Inc., et al., Petitioners
v.
Ricoh Corporation, et al.

Docketed:
May 22, 1987

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Flowers III,F. A.

Counsel for respondent: Lightfoot,Warren B., Phelps,Scott M.

Entry	Date	Note	Proceedings and Orders
1	May 22 1987	G	Petition for writ of certiorari filed.
2	May 29 1987		Waiver of right of respondent Ricoh Corporation to respond filed.
3	Jun 9 1987		DISTRIBUTED. June 25, 1987
4	Jun 25 1987	P	Response requested -- BRW, TM, SOC. (Due July 25, 1987)
6	Jul 7 1987		Order extending time to file response to petition until August 5, 1987.
7	Aug 7 1987		Brief of respondents Rioch Corp., et al. in opposition filed.
8	Aug 12 1987		REDISTRIBUTED. September 28, 1987
9	Aug 17 1987	X	Reply brief of petitioners Stewart Organization, Inc., et al. filed.
11	Oct 2 1987		REDISTRIBUTED. October 9, 1987
12	Oct 13 1987		Petition GRANTED.
			**********
13	Nov 16 1987		Joint appendix filed.
14	Nov 18 1987		Record filed.
		*	Certified copy of original record received. 2 volumes.
15	Nov 25 1987		Brief of petitioners Stewart Organization, et al. filed.
17	Jan 4 1988		Brief of respondents Rioch Corp., et al. filed.
16	Jan 5 1988		SET FOR ARGUMENT. Monday, February 29, 1988. (1st case). (1 hour).
18	Jan 14 1988		CIRCULATED.
19	Feb 2 1988	X	Reply brief of petitioner Stewart Org., et al. filed.
20	Feb 29 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1908

Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-

IN THE

Supreme Court Of The United States

October Term, 1986

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH W. LETZER
F. A. FLOWERS, III*
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners, The Stewart Organization, Inc.; Walter H. Stewart, and James S. Snow, Jr.

*Counsel of Record

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

QUESTION PRESENTED FOR REVIEW

Does state law or federal law govern the enforceability of a forum-selection clause in a contract between two private parties, when the forum state has a strong public policy against the enforcement of such contractual provisions?

INFORMATION REQUIRED BY RULE 28.1

The Stewart Organization, Inc., one of the petitioners herein, is a corporation incorporated under the laws of the State of Alabama, and its principal place of business is in Birmingham, Alabama. The Stewart Organization, Inc. is not a subsidiary of any other company, and it has no subsidiaries.

Respondent, Ricoh Corporation, formerly known as Ricoh of America, Inc., is a corporation incorporated under the laws of the State of Delaware, and its principal place of business is in West Caldwell, New Jersey. At the time this action was filed, however, Ricoh Corporation was a corporation incorporated under the laws of the State of New York, rather than Delaware, and its principal place of business was in West Caldwell, New Jersey, as it is now.

Respondent, Ricoh Corporation, is a subsidiary of Ricoh Company, Ltd., a Japanese corporation. Respondent, Ricoh Corporation, also has two subsidiaries of its own, Ricoh Electronics, Inc., a California corporation, and Ricoh Corporation (Canada), Ltd., an Ontario corporation.

The subsidiary known as Ricoh Electronics, Inc. also has two subsidiaries, Ricoh Development of California, Inc., and Ricoh Thermal Systems, Inc. Both of these subsidiaries are California corporations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
INFORMATION REQUIRED BY RULE 28.1	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. The Decision By The Court Below Is In Direct Conflict With Applicable Decisions Of This Court.	6
II. The Decision By The Court Below Is In Direct Conflict With Decisions By The Third And Ninth Circuits On The Same Issue.	10
III. The Issue In This Case Warrants Review Because It Raises Important Questions Regarding The Proper Distribution Of Power Between The State And Federal Courts.	12
CONCLUSION	15
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases: *Page(s)*

Angel v. Bullington, 330 U.S. 183 (1947) 13

Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982) 12

Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1955) 10

Blalock v. Perfect Subscription Co., 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979) 14

Bryant Elec. Co., Inc. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985) 12

Burlington Northern R. Co. v. Woods, ____ U.S. ____, 107 S.Ct. 967 (1987) 10

Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63 (S.D.N.Y. 1975) 14

Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage, 735 F.2d 380 (9th Cir. 1984) 11

Commicommodity Services, Inc. v. TransAmerica Leasing, Inc., 473 So.2d 1053 (Ala. 1985) 6

Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (S.D.N.Y. 1974) 13

Day & Zimmerman v. Challoner, 423 U.S. 3 (1975) 10, 13

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) ..... *passim*

Fireman's Fund American Ins. Companies, Inc. v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294 (1st Cir. 1974) 12

General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986) 10

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 7, 13, 14

Hanna v. Plumer, 380 U.S. 460 (1965) ..... *passim*

Horning v. Sycom, 556 F. Supp. 819 (E.D. Ky. 1983) 12

In re Fireman's Fund Ins. Co., 588 F.2d 93 (5th Cir. 1979) 12

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Keystone Leasing v. Peoples Protective Life Ins. Co., 514 F. Supp. 841 (E.D.N.Y. 1981) 14

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 7, 12, 13

Matthews v. Swift & Co., 465 F.2d 814 (5th Cir. 1972) 14

Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 8, 11, 14

National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) 10

Redwing Carriers, Inc. v. Foster, 382 So.2d 554 (Ala. 1980) 5

Snyder v. Smith, 736 F.2d 409 (7th Cir. 1984) 12

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 8

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 8

The Stewart Organization, Inc. v. Ricoh Corp., 779 F.2d 643 (11th Cir. 1986) 3

The Stewart Organization, Inc. v. Ricoh Corp., 785 F.2d 896 (11th Cir. 1986) 4

The Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987) (*en banc*) 2, 4

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 9, 10, 12

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 8

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 3

28 U.S.C. § 1652 ..... 2, 6

28 U.S.C. § 2072 9

TABLE OF AUTHORITIES – (Continued)

Rules: *Page(s)*

Rule 17, Rules of the Supreme Court of the United States 6

Other:

Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1 (1976) 8

Restatement (Second) of Conflict of Laws § 187 (1971) 14

No. 86-

IN THE

Supreme Court Of The United States

October Term, 1986

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, The Stewart Organization, Inc.; Walter H. Stewart, and James S. Snow, Jr. ("petitioners" or "The Stewart Organization"), respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on February 23, 1987. In addition, petitioners respectfully request this Court to reverse the judgment of the court of appeals and remand the case with directions to enter a judgment affirming the order of the district court entered herein on January 29, 1985.

OPINION BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported in *The Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (*en banc*). The court's opinion is reproduced in the Appendix at pages 1-21.

JURISDICTION

The judgment sought to be reviewed was dated and entered on February 23, 1987. (App. 44-45). This petition for a writ of certiorari is being filed within 90 days after entry of the Eleventh Circuit's judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The statute involved in this case is section 34 of the Judiciary Act of 1789, which is presently codified at 28 U.S.C. § 1652. The statute reads as follows:

> 28 U.S.C. § 1652 State laws as rules of decision
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This diversity action was commenced on September 28, 1984, when the petitioners, who are all resident citizens of the State of Alabama, filed a complaint in the United States District Court for the Northern District of Alabama against the respondents, Ricoh of America, Inc., and its successor-in-interest, Ricoh Corporation, which, at that time, was a New York corporation ("respondents" or "Ricoh"). Petitioners sought damages from respondents for breach of contract, breach of

warranty, fraud, and deceit. Petitioners also asserted a claim against respondents for violations of the antitrust laws.

In response to the complaint, respondents filed a motion to dismiss or transfer the case on the grounds of improper venue and *forum nonconveniens*. Respondents' motion was predicated upon the forum-selection clause found under the heading "General Provisions" on page six of the contract entered into between Ricoh and The Stewart Organization:

> 18. General Provisions
>
> 18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this agreement and shall be a proper forum in which to adjudicate such case or controversy.

Following the submission of briefs and oral argument, the district court entered an order denying respondents' motion to dismiss or transfer on the basis of the forum-selection clause contained in the contract. (App. 42-43). The court held that Alabama law, rather than federal law, governed the enforceability of the forum-selection clause, and that "Alabama clearly does not favor forum-selection clauses in contracts." (App. 43). The district court certified its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b), and the court of appeals accepted jurisdiction over the appeal on April 2, 1985. (App. 25-26).

The panel hearing the appeal rendered its decision on January 10, 1986. *The Stewart Organization, Inc. v. Ricoh Corp.*, 779 F.2d 643 (11th Cir. 1986) (App. 23-41). Judge Johnson, writing for himself and Judge Tuttle, held that: (1) federal law governs the enforceability of forum-selection clauses because such clauses "present procedural questions" similar to those regarding venue; (2) under federal law, the forum-selec-

tion clause should be enforced; and (3) the clause governed all claims asserted in the complaint. (App. 32-36).

Chief Judge Godbold dissented from the panel decision, stating that "[t]he enforceability of contract provisions is typically an issue of substance which a federal court sitting in diversity jurisdiction must decide according to state law." (App. 36-37). Moreover, he wrote, "the venue statutes do not express a wider federal interest that displaces state law in this area" because: (1) the venue statutes "do not address the question whether or under what circumstances a party will be deemed to have antecedently consented to proceed in one or another of the districts in which venue is properly laid"; and (2) "the venue statutes themselves leave important blanks to be filled in by reference to state law." (App. 40). Under "principles of federalism," Judge Godbold concluded, Alabama's policy of not enforcing contractual forum-selection clauses should be respected. (App. 41).

Following the panel's decision, The Stewart Organization filed a petition for rehearing *en banc*, which was granted on March 14, 1986. *The Stewart Organization, Inc. v. Ricoh Corp.*, 785 F.2d 896 (11th Cir. 1986) (App. 22). In its order granting rehearing *en banc*, the court also vacated the panel's decision. (*Id*).

The court of appeals, sitting *en banc*, rendered its decision in this case on February 23, 1987. *The Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (App. 1-21). A plurality of five judges, out of thirteen judges hearing the case, framed the issue as "whether federal or state law governs the enforceability of a forum selection clause." (App. 3). Adopting the panel's reasoning that forum-selection clauses "present procedural questions" similar to those regarding venue, and using as a guide this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965), the plurality held that "forum-selection clauses present procedural questions to be resolved by federal law independent of forum state policy." (App. 2). The plurality also held that, under federal law, the forum-selection

clause at issue should be enforced and that the clause governed all claims asserted in the complaint. (App. 6-9).

Three judges concurred in the court's judgment reversing the district court, but for different reasons. (App. 9-19). In their view, the district court should have given effect to the forum-selection clause and transferred the case to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404 (a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." (*Id*). To do otherwise, Judge Tjoflat wrote, would have been an abuse of discretion. (App. 9).

Judge Godbold, joined by four other judges, dissented from the court's judgment. (App. 19-21). In addition to the reasons set forth in his dissent from the panel's decision, Judge Godbold also dissented on the ground that, because there is no provision in any federal statute, including the venue statutes, addressing the enforceability of contractual forum-selection clauses, the court must use rules drawn from state contract law. (App. 20-21). "As a result of the en banc decision," Judge Godbold concluded, "the state courts will go in one direction and the federal another, which takes litigants back to the kinds of forum shopping described in my dissent and deplored in *Erie*." (App. 21). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The court below held that federal law, rather than state law, governs the enforceability of a forum-selection clause in a contract between two private parties, even though the forum state (Alabama) has a strong public policy against the enforcement of such contractual provisions. *See Redwing Carriers, Inc. v. Foster*, 382 So.2d 554, 556 (Ala. 1980) (a forum-selection clause "does not govern venue" and such contractual provisions are "invalid and unenforceable as being contrary to public pol-

icy"); *Commicommodity Services, Inc. v. TransAmerica Leasing, Inc.*, 473 So.2d 1053 (Ala. 1985) (same). In so holding, the Eleventh Circuit rendered a decision on an important question of federal law in direct conflict with applicable decisions of this Court and in direct conflict with applicable decisions of two other federal courts of appeals.

Furthermore, the Eleventh Circuit's decision in this case represents an unjustifiable intrusion upon Alabama's right to fashion laws and policies to protect its citizens, in violation of our system of federalism. In short, the issue in this case warrants review because it raises important questions regarding the proper distribution of power between the state and federal courts. For all these reasons, the writ should be granted. Sup. Ct. Rule 17.

I. The Decision By The Court Below Is In Direct Conflict With Applicable Decisions Of This Court.

Prior decisions of this Court compel the conclusion that state law, rather than federal law, governs the enforceability of contractual forum-selection clauses in diversity cases. In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), Justice Brandeis, writing for the Court, noted that under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court," and, therefore, the *Swift* doctrine "had prevented uniformity in the administration of the law of the state." 304 U.S. at 74-75.

In overruling *Swift v. Tyson, supra*, the Court in *Erie* expressly held that the federal courts, absent a constitutionally sound grant of authority by Congress, do not have the authority or power to develop federal common law when faced with issues involving *"purely commercial law"* and *"obligations under contracts entered into and to be performed within the State."* 304 U.S. at 75 (emphasis added). Under the Rules of Decision Act, 28 U.S.C. § 1652, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to

be applied in any case is the law of the state." *Erie*, 304 U.S. at 78.

The decision by the court below is in direct conflict with this Court's decision in *Erie*. As a result of the Eleventh Circuit's decision in this case, the state courts in Alabama will refuse to enforce contractual forum-selection clauses, while the federal courts sitting in diversity only three blocks away will enforce such clauses. This is precisely the evil which *Erie* sought to eliminate.

Following *Erie*, this Court held in *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), that the "accident of diversity" should not disturb the "equal administration of justice in coordinate state and federal courts sitting side by side," even at the expense of inconsistency within the federal court system as a whole. 313 U.S. at 496. "Any other ruling would do violence to the principle of uniformity *within a state* upon which the *Tompkins* decision is based." *Id.* (emphasis added). Indeed, as the Court held four years later in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), "the operation of a double system of conflicting laws in the same state is plainly hostile to the reign of law. Certainly, the fortuitous circumstances of residence out of a state of one of the parties ought not to give rise to a discrimination against others equally concerned but locally resident." 326 U.S. at 112. The decision by the court below, on its face, plainly violates this fundamental principle.

The decision by the court below is also in conflict with *Erie* and its progeny for an additional reason. There is no constitutional provision or federal statute, including the venue statutes, directly addressing the enforceability of forum-selection clauses. We are simply not confronted with any conflict between a federal law and a state law. Accordingly, there being no federal law governing the enforceability of forum-selection clauses, the Rules of Decision Act is the relevant statute. Consequently, *"state law must govern because there can be no other law"* to apply. *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965) (emphasis added).

Moreover, the enforceability of forum-selection clauses involves questions of "common law." As at least one commentator has noted, "[t]he *common law* approach was that parties to a *contract* could not 'oust' or prevent a court from taking jurisdiction, and *agreements* purporting to do so were void. . . . So at *common law*, the parties' intention embodied in a choice of court provision was ignored." Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1, 8 (1976) (emphasis added). In this case, therefore, we are dealing with a state-created right derived from the common law – the right of Alabama citizens to resolve their disputes with others in Alabama.

The court below, however, created a federal policy in favor of forum-selection clauses out of whole-cloth and imposed it over an actual state interest. The Eleventh Circuit's creation of federal common law in favor of forum-selection clauses is in direct conflict with this Court's holding in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). In *Texas Industries*, the Court held that "the vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate *federal common law*, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a *common law* to govern those areas until Congress acts." 451 U.S. at 640-41 (emphasis added). The question whether "latent federal power should be exercised to displace state law is primarily a decision for Congress." *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31-32 (1977), *quoting*, *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Again, until Congress acts, "state law must govern because there can be no other law" to apply. *Hanna v. Plumer*, *supra*.[1]

[1]Even in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in which a forum-selection clause was enforced in admiralty, the Court indicated that the enforceability of forum-selection clauses is primarily a matter of contract law, not a matter of procedure or venue. *See* 407 U.S. at 11-12. Of course, *Erie* was not even cited in *The Bremen*, because the federal courts have exclusive jurisdiction over admiralty cases and the power to develop substantive law in that area. Furthermore, even under *The Bremen*, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 16.

Finally, the court below misapplied this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). In *Hanna*, the Court held that in a civil action based upon diversity of citizenship, Rule 4 (d) (1) of the Federal Rules of Civil Procedure, rather than state law, governed the manner in which process was served. In reaching its holding, the Court concluded that the *Erie* doctrine was simply not the appropriate test of the validity and applicability of one of the Federal Rules of Civil Procedure. 380 U.S. at 370. Where one of the Federal Rules is clearly applicable, the Court explained, the test is whether the Rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, rather than the Rules of Decision Act, the statute involved in *Erie* and this case, and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I. 380 U.S. at 470-72.

As the Court expressly recognized in *Hanna*, "the line of cases following *Erie* diverged markedly from the line construing the Enabling Act." 380 U.S. at 465. "Nor has the development of [these] two separate lines of cases been inadvertent." The Enabling Act rule, on the one hand, and the *Erie* rule, on the other hand, "were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice. . . ." 380 U.S. at 471.

Indeed, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), "specific limitations" were placed on the *Hanna* analysis – "[a]pplication of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and state law." 446 U.S. at 749, *quoting*, *Hanna*, 380 U.S. at 472. *Only* if there is an "unavoidable" clash between the Federal Rule and the state law does "the *Hanna* analysis appl[y]." 446 U.S. at 749-50.[2]

[2]In *Walker*, the Court held that Oklahoma's service-of-process statute applied in diversity cases, which resulted in the action being barred, despite Rule 3 of the Federal Rules of Civil Procedure, which provides that an action is commenced by the filing of a complaint with the district

In this case, contrary to the decision by the court below, the scope of the venue statutes is not "sufficiently broad" to cause a "direct collision" with the state law involved, thereby leaving no room for the operation of Alabama's policy against forum-selection clauses. *Walker, supra.* Both the federal venue statutes and Alabama's policy against forum-selection clauses can exist side by side, "each controlling its own intended sphere of coverage without conflict." *Walker, supra.* The court below was wrong in concluding otherwise.[3]

Accordingly, because the decision by the court below is legally incorrect and in direct conflict with applicable decisions of this Court, the Court should issue the writ. *See, e.g., Burlington Northern R. Co. v. Woods,* ____ U.S. ____, 107 S.Ct. 967, 968 (1987) (certiorari granted, in part, to consider *Erie* claim); *Day & Zimmerman v. Challoner,* 423 U.S. 3 (1975) (certiorari granted to require Fifth Circuit to apply the *Klaxon* rule); *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 200 (1955) ("The case is here on a petition for certiorari which we granted because of the doubtful application by the Court of Appeals of *Erie R. Co. v. Tompkins, supra*").

II. The Decision By The Court Below Is In Direct Conflict With Decisions By The Third And Ninth Circuits On The Same Issue.

In *General Engineering Corp. v. Martin Marietta Alumina, Inc.,* 783 F.2d 352 (3d Cir. 1986), the Third Circuit discussed in detail whether state law or federal law governed the enforceability of a forum-selection clause in a contract between

court. The "*Hanna* analysis does not apply," the Court said, "since there is no direct conflict between the Federal Rule and the state law." 446 U.S. at 752.

[3]The court below also erred, for the reasons stated by Judge Godbold in his dissent from the panel's decision, by relying on this Court's decision in *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 318 (1964) ("We hold only that prompt notice to the respondents having been given, Florence Weinberg was their 'agent authorized by appointment' to receive process within the meaning of Federal Rule of Civil Procedure 4 (d) (1)"). (App. 38-39).

two private parties. The court held that state law, rather than federal law, should be applied, stating as follows:

> The construction of contracts is usually a matter of state, not federal, common law. . . . Only rarely will federal common law displace state law in a suit between private parties. As the Court in *Miree v. DeKalb County, Georgia,* 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), observed in a suit between private parties where federal common law was sought to be applied, "normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. [The question whether] latent federal power should be exercised to displace state law is primarily a decision for Congress." 433 U.S. at 31-32, 97 S.Ct. at 2494-95 (citing *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 39 (1966).[4]
>
> • • •
>
> *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), teaches that federal jurisdiction alone does not create a sufficiently strong federal policy to deny the application of state law. The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law. . . . Therefore, the question of what law governs this contract (and hence, the enforceability of its forum selection clause) must be determined in the first instance by Virgin Islands law.

783 F.2d at 356-57.

Also contrary to the decision below is the Ninth Circuit's decision in *Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage,* 735 F.2d 380 (9th Cir. 1984). In *Pugh Brothers,* the court applied Oregon law in determining whether a forum-selection clause was enforceable, concluding that, "under Oregon law, a choice-of-forum clause will be given effect

[4]In *Miree,* "the fact that the United States has a substantial interest in regulating aircraft travel and promoting air travel safety" was not sufficient to justify displacing state law. 433 U.S. at 31.

unless it would be unfair or unreasonable to do so." 735 F.2d at 382.[5]

As the foregoing cases clearly demonstrate, forum-selection clauses are simply contractual provisions like any other contractual provision, no more and no less. As such, they must be interpreted according to the applicable state contract law, whether the issue is the meaning of the clause or its essential validity and enforceability. Accordingly, because the decision by the court below is legally incorrect and in direct conflict with decisions by the Third and Ninth Circuits on an important question of federal law, the Court should issue the writ. *See, e.g., Walker v. Armco Steel Corp.*, 446 U.S. 740, 744 (1980) ("We granted certiorari because of a conflict among the Courts of Appeals"); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494 (1941) (same).

III. The Issue In This Case Warrants Review Because It Raises Important Questions Regarding The Proper Distribution Of Power Between The State And Federal Courts.

The federal system of the United States reserves to each state many powers, preeminent among them is the right to safeguard

[5]Other circuits have applied federal law, without addressing the *Erie* question. *See Fireman's Fund American Ins. Companies, Inc. v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294 (1st Cir. 1974) (issue not addressed; case analyzed under Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*); *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2d Cir. 1982) (*Erie* not discussed; federal question case); *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985) (no resolution of the issue because state law and federal law were the same; district court applied state law); *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979) (issue not addressed; Miller Act case); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984) (issue not addressed; Federal Arbitration Act controlled). *But see Horning v. Sycom*, 556 F. Supp. 819, 821 (E.D. Ky. 1983) (enforceability of a forum-selection clause is "a matter of substantive contract law"); *Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011, 1015-16 (S.D. W.Va. 1976), *disapproved of on other grounds, Hoffman v. National Equipment Rental, Ltd.*, 643 F.2d 987 (4th Cir. 1981) (enforceability of a contractual forum-selection clause governed by "West Virginia substantive law"); *Davis v. Pro Basketball, Inc.*, 381 F. Supp. 1, 3 (S.D.N.Y. 1974) (enforceability governed by New York law).

the welfare and rights of its citizens. Alabama has expressed a strong public policy against forum-selection clauses, thereby guaranteeing its citizens a local forum, so that they cannot be forced to vindicate their rights in distant, expensive forums, or lose those rights. It simply makes no sense for such a right to be recognized in a state court sitting in Birmingham, Alabama, but not recognized in a federal court sitting in diversity only three blocks away. After all, for purposes of diversity jurisdiction, "a federal court is in effect, only another court of the state," *Angel v. Bullington*, 330 U.S. 183, 187 (1947), and "Congress afforded out-of-state litigants another tribunal, not another body of law." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945). Whatever lack of uniformity this may produce between federal courts in different states "is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue *local policies* diverging from those of its neighbors." *Klaxon*, 383 U.S. at 496 (emphasis added).

While the court below obviously disagrees with Alabama's policy, as well as its underlying rationale, "a federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmerman v. Challoner*, 423 U.S. 3, 4 (1975). To hold otherwise, as the court below held, is simply a return to the overthrown doctrine of *Swift v. Tyson*.[6]

[6]The court below believed that Alabama's policy against contractual forum-selection clauses "is for the protection of the jurisdiction of the state courts rather than the protection of the state's citizens." (App. 6). As demonstrated above, however, for purposes of diversity jurisdiction, "a federal court is in effect, only another court of the state." *Angel v. Bullington, supra*. Furthermore, as Judge Godbold pointed out, the plurality's interpretation of Alabama's policy is absurd, because, even if it were true, "[t]he only way the state's interest can be vindicated is through parties' raising the issue." (App. 21).

In summary, *Erie* was not just a case, or even a vehicle for the enunciation of a legal principle. It expressed an important policy regarding federalism, and that policy must be kept free from entanglements or terminological niceties such as "substance" and "procedure." As Justice Harlan declared, *Erie* is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). The writ should be issued in this case because the question presented for review is of fundamental importance to our system of federalism, upon which our nation was founded. *See, e.g., Miree v. DeKalb County, Georgia*, 433 U.S. 25, 26 (1977) ("We granted certiorari to consider whether federal or state law should have been applied"); *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) ("The importance of the question for the disposition of litigation in the federal courts led us to bring the case here").[7]

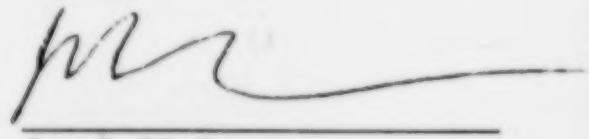
---

[7]Alabama law, rather than New York law, which enforces forum-selection clauses, governs the enforceability of the forum-selection clause at issue, notwithstanding the fact that the contract entered into between Ricoh and The Stewart Organization provides that New York law governs. This is true because the court below, as well as the courts of Alabama and New York, will not give effect to a choice-of-law clause when application of the law of the chosen state (New York) would be contrary to a fundamental policy of the state whose law would otherwise apply, here Alabama. *See Matthews v. Swift & Co.*, 465 F.2d 814, 818 (5th Cir. 1972); *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123, 127 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979); *Keystone Leasing v. Peoples Protective Life Ins. Co.*, 514 F. Supp. 841, 847 (E.D.N.Y. 1981); *Business Incentives Co. v. Sony Corp. of America*, 397 F. Supp. 63, 67 (S.D.N.Y. 1975). *See generally* Restatement (Second) of Conflict of Laws § 187(2)(b) (1971).

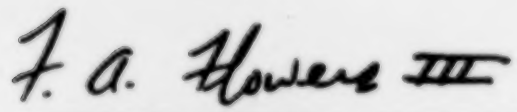
CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the court of appeals, and remand the case with directions to enter a judgment affirming the order of the district court entered herein on January 29, 1985.

Respectfully submitted,



Joseph W. Letzer



F. A. Flowers, III*

Counsel for Petitioners, The Stewart Organization, Inc.; Walter H. Stewart, and James S. Snow, Jr.

**Counsel of Record*

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

APPENDIX

The STEWART ORGANIZATION, INC., a corporation; Walter H. Stewart, and James S. Snow, Jr., Plaintiffs-Appellees,

v.

RICOH CORPORATION, a corporation, Ricoh of America, Inc., a corporation, Defendants-Appellants.

No. 85-7231.

United States Court of Appeals,
Eleventh Circuit.

Feb. 23, 1987.

Alabama copy machine dealer brought diversity action against New York manufacturer, alleging breach of contract, breach of warranty, fraud, and federal antitrust violations. The United States District Court for the Northern District of Alabama, No. CV84-AR-2460-S, William M. Acker, Jr., J., denied manufacturer's motion to enforce contractual forum selection clause. Manufacturer petitioned for permission to appeal. The Court of Appeals, 779 F.2d 643, Johnson, Circuit Judge, reversed and remanded with instructions. Subsequently, the Court, 785 F.2d 896, granted a petition for rehearing and vacated. Thereafter, the Court of Appeals held that: (1) federal law, not law of Alabama applied to determine effect of forum selection clauses in contract, and (2) forum selection clause was enforceable under federal law.

Reversed and remanded.

Tjoflat, Circuit Judge, specially concurred and filed an opinion in which Kravitch and Anderson, Circuit Judges, concurred.

Godbold, Circuit Judge, dissented and filed opinion in which Vance, Hatchett, Clark and Edmondson, Circuit Judges, concurred.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges, and TUTTLE*, Senior Circuit Judge.

PER CURIAM:

This case was taken *en banc* to consider whether a freely negotiated contractual "choice of forum clause" is enforceable in diversity actions in federal court when the forum state considers such clauses to be violative of state public policy. The district court in Alabama refused to enforce the clause because it was of the opinion that state law governed the enforceability of a forum selection clause. Alabama law deems such clauses contrary to public policy. We reverse, holding that forum selection clauses present procedural questions to be resolved by federal law independent of forum state policy.

The Stewart Organization, Inc., a closely held corporation in Birmingham, Alabama, filed this breach of contract action in the United States District Court for the Northern District of Alabama against Ricoh Corporation, a nationwide manufacturer of copy machines with headquarters in New Jersey and significant corporate operations conducted in Manhattan. The contract, a dealer sales agreement for Ricoh manufactured products, contains both choice of law and choice of forum clauses with the latter clause providing that the courts in New York City, the Borough of Manhattan, would have "exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy."

The district court refused to enforce this contractual agreement and asserted jurisdiction over the case. A panel of this Court reversed, holding that the contract is enforceable as a matter of federal law, and that the Alabama law which would hold such contracts invalid as a matter of public policy was inapplicable.

*TUTTLE, Senior Circuit Judge, has elected to participate in this matter pursuant to 28 U.S.C. 46 (c).

The threshold question is whether federal or state law governs the enforceability of a forum selection clause. The panel opinion chronicles the difficulties the Supreme Court has had in attempting to handle the difficult question of which law, state or federal, will govern various aspects of the decisions of federal courts sitting in diversity. *Stewart Organization, Inc, v. Ricoh Corp.*, 779 F.2d 643, 645-47 (11th Cir.1986).

Our decision as to the choice of forum clause boils down to whether these two parties may choose the courts of Manhattan as the appropriate venue to try the controversy arising from this contract. Employing *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) as the guide, we hold that venue in a diversity case is manifestly within the province of federal law. In *Hanna*, the Supreme Court determined that to the extent that Congress has enacted federal procedural rules (and implicitly federal statutes governing federal court procedure), the question is governed by federal law. Noting the important federal interests supporting the use of federal law, the *Hanna* court observed:

> Although this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State, courts of appeals faced with such clashes have rightly discerned the implications of our decisions.
>
> One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers — when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority. *Lumbermen's Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (C.A. 5th Cir.1963).

> *Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.
>
> • • • • • •
>
> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna, 380 U.S. at 472-474, 85 S.Ct. at 1144-46 (footnotes omitted).

Under *Hanna*, federal law, not Alabama law, must be applied to determine the effect of forum selection clauses. This decision is dictated by both statute and binding precedent. Venue is a matter of federal procedure for several reasons. As to statutory law: *First*, Congress has specifically provided, by statutory enactment, rules of venue to govern federal district courts in diversity actions. 28 U.S.C.A. §§ 1391, *et seq*. By providing specific provisions rather than allowing rules of venue to be governed by state common law, the statute makes clear that Congress considered this a question appropriately governed by federal legal standards. *Second*, Congress has approved the adoption of Fed.R.Civ.P. 12(b) (3) and 41(b), federal procedural rules that direct federal courts as to the principles involved in deciding questions of venue. As the panel stated in reflection on these rules:

> If venue were to be governed by the law of the state in which the forum court sat, the federal venue statute would be nugatory. Nor would there be any legitimacy to the Federal Rules that govern certain aspects of venue, for they would tread on state prerogatives. *Hanna* clearly rejected this notion.

As to case law: a year before *Hanna* was decided, the Supreme Court in *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), considered a diversity case analogous to the instant case. Michigan residents

leased farm equipment from a New York-based company. The contract contained in fine print both choice of forum and choice of law clauses, both favoring New York. The Szukhents did not read this provision. The Court held this clause enforceable because "it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . ." *Id.* at 315-16, 84 S.Ct. at 414. While the central issue in the case was the propriety of another clause designating a New York agent for service of process, the Court upheld the clause in all respects without reference to either New York or Michigan law. *Id.*

The second case, *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), although not controlling because it arose under an admiralty statute creating exclusive federal jurisdiction, is nevertheless instructive with respect to the growing judicial approval of choice of forum clauses. The Court noted:

> [f]orum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum-selection clauses. This view, advanced in the well-reasoned dissenting opinion [from the circuit court's decision] in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty. . . . The choice of [the] forum [in the present case] was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

Id. at 9-12, 92 S.Ct. at 1912-1914 (footnotes omitted).

Similarly, in *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231 (11th Cir.1985) (per curiam), a panel of this Court con-

sidered in diversity a contractual forum selection clause that referred the case to Brazil. There, the court held that because the clause was ambiguous as to whether it vested venue solely or concurrently in Brazil, an American court could hear the suit. The analysis regarding the enforceability of the clause, however, turned on the reasonableness principles set forth in *The Bremen*. There is no reason not to apply *The Bremen* test to domestic cases. Indeed, the Second Circuit did precisely this in a case similar to the instant one. In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 721-22 (2d Cir.1982), the Second Circuit Court of Appeals expressly declined to use Texas venue law, which disfavored forum selection clauses, to undo a contractual agreement.

Applying federal law to this question, the inquiry is whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*. There the Supreme Court identified two factors that might justify refusing to enforce a clause. First, "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." 407 U.S. at 15, 92 S.Ct. at 1916. At first glance, this appears to support The Stewart Organization's argument that the choice of forum clause should not be enforced because the Alabama courts have deemed such clauses as violative of public policy. *See Redwing Carriers, Inc. v. Foster*, 382 So.2d 554, 556 (Ala.1980). A closer look at *Redwing* reveals, however, that the Alabama policy is for the protection of the jurisdiction of the state courts rather than the protection of the state's citizens. The *Redwing* court held:

> We consider contract provisions which attempt to *limit the jurisdiction of the courts of this state* to be invalid and unenforceable as being contrary to public policy. (emphasis added).

The Supreme Court of Alabama would not seem to be concerned with the protection of the jurisdiction of the federal district courts located in the state. Indeed, if a contract sought to

require litigation in a federal court in Alabama, it can be presumed the agreement would be unenforceable in an Alabama state court. Since this case will be tried in federal court, the protection of state court jurisdiction is not involved. There are simply no federalism concerns in deciding which federal court will try a case of federal jurisdiction. New York law will govern the underlying dispute. The parties, by the terms of the contract, have agreed to this. Under *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), the resolution of the choice of forum question should not affect the substantive outcome of the case. Both New York and Alabama would enforce the contract in this regard and apply New York law.

A second factor which might justify refusal to enforce a forum selection clause would be "if the chosen forum is *seriously* inconvenient for the trial of the action." *The Bremen*, 407 U.S. at 16, 92 S.Ct. at 1916 (emphasis in original). The party opposing the clause must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Id.* at 18, 92 S.Ct. at 1917.

The Stewart Organization has failed to meet this heavy burden of proof. First, and most importantly, The Stewart Organization will not be deprived of its day in court. Although it may be more expensive for it to do so, the record does not show that Mr. Stewart or The Stewart Organization is unable to afford the costs of litigating this case in Manhattan. Second, there is no merit to The Stewart Organization's argument that the contract should be held void because it is a product of fraud and overreaching. They argue that Ricoh possessed superior bargaining power and that Mr. Stewart was pressured into signing this contract by a pushy salesman. Mr. Stewart, however, is a certified public accountant of fifteen years standing and is a senior partner in a major Birmingham firm. He is a knowledgeable, sophisticated and successful businessman, participat-

ing in several ventures that have produced multimillion dollar profits. He purchased a failing local copying business and took it from $750,000 indebtedness to sales of 1.8 million in one year. The record reflects an "arm's-length negotiation by experienced and sophisticated businessmen, and [because there is absence of] some compelling and countervailing reason it should be . . . enforced by the court [ ]." *The Bremen,* 407 U.S. at 12, 92 S.Ct. at 1914.

The final issue to be addressed is whether this forum selection clause is sufficiently broad to require the transfer of all claims to a New York court. The district court was concerned that this clause would "not control the forum for trying those counts or causes of actions which are not contractual in nature, so that a transfer of the causes insofar as based on claims of breach of contract would simply split the controversy between forums and waste judicial resources." This refers to the claims of breach of warranty, fraud, and the antitrust claims.

The district court's concern is ill-founded for two reasons. *First,* it is clear from the language of the agreement that the forum selection clause encompassed any dispute arising out of or in connection with the dealer-manufacturer relationship. The contract refers to *any* "case or controversy arising under or in connection with this Agreement." This includes all causes of action arising directly or indirectly from the business relationship evidenced by the contract. In *Bense,* the Second Circuit read the language of a forum selection clause that encompassed actions arising "directly or indirectly" from the contract as permitting the court to order transfer of the entire case. 683 F.2d at 720. This principle is sound because it promotes a more orderly and efficient disposition of the case in accordance with the parties' intent. This is consistent with the Supreme Court's directive in *The Bremen* to encourage commercial reliance on forum selection clauses and thus keep intact the usefulness of these agreements. Commercial contractual issues are commonly intertwined with claims in tort or criminal or antitrust law.

For the reasons foregoing, we find the choice of forum clause in this contract is in all respects enforceable generally as a matter of federal law and specifically within the confines of this case. The judgment of the district court is accordingly REVERSED and this case is REMANDED with instructions to transfer this action to an appropriate court in the City of New York and the Borough of Manhattan.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring, in which KRAVITCH and ANDERSON, Circuit Judges, concur:

I concur in the court's judgment, directing the district court to transfer this case to the United States District Court for the Southern District of New York. I write separately, however, because I disagree with the majority's analysis of the questions this appeal presents. In my view, we must decide whether the district court erred by refusing to consider the parties' choice-of-forum clause in passing on the defendant's motion to transfer this case to the Southern District of New York, pursuant to 28 U.S.C. § 1404 (a) (1982).[1] If the court should have considered the clause, we must then decide whether it would have been an abuse of discretion not to transfer this case. The district court concluded that the doctrine of *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), precluded it from giving any effect to the choice-of-law clause because Alabama forbids its courts from honoring such provisions. I believe that the *Erie* doctrine presents no bar and that the district court should have taken the clause into account in deciding the section 1404 (a) motion. I also believe that the facts in this case make it clear that the district court would have abused its discretion if it refused to transfer this case.

---

[1] 28 U.S.C. § 1404 (a) (1982) states as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

I.

A.

Historically, the law has accorded a plaintiff the right to choose the forum in which to litigate his case. This right, however, is subject to two limitations. First, the plaintiff's right to select a forum is confined to those forums where he can obtain jurisdiction over the defendant. Second, the plaintiff's right is restricted to those courts where venue is proper. A plaintiff, whose cause of action is based on state law and who can bring his suit in more than one state, will sue in the state whose conflict-of-laws rules will produce the most favorable rule of decision. If the conflict-of-laws rules of each of these states would ultimately call for the same rule of decision, then the plaintiff will choose the state most convenient for him.

What I have said also applies when the plaintiff decides to bring his state law claim to federal court, invoking its diversity of citizenship jurisdiction. The doctrine laid down by *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and reinforced in *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), guarantees him that the federal court will apply the same conflict-of-laws rules and the same rule of decision as would the courts of the state in which it sits.

Recognizing that another federal court might be a more suitable place to try a case than the court the plaintiff chooses, Congress passed a statute, the Act of June 25, 1948, 62 Stat. 937 (codified as amended at 28 U.S.C. § 1404(a) (1982)),[2]

[2]Prior to the enactment of section 1404(a), federal courts could dismiss a case for *forum non conveniens* reasons, even if venue was proper. *See Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). A dismissal on *forum non conveniens* grounds could effectively bar a plaintiff's opportunity to proceed with his claim, as when the statute of limitations in the more convenient forum had completely run. *See Norwood v. Kirkpatrick,* 349 U.S. 29, 31-32, 75 S.Ct. 544, 546, 99 L.Ed. 789 (1955). By permitting district courts to transfer cases they might otherwise have dismissed, section 1404(a) mitigates the harsh consequences a plaintiff might suffer by bringing his action in a proper, but inconvenient, forum.

authorizing a district court to transfer a civil action to another district "[f]or the convenience of parties and witnesses, in the interest of justice," if venue is otherwise proper in the transferee district. Through this law, Congress increased the efficiency of the federal court system. In doing so, it gave the district courts the discretion to override the plaintiff's traditional right to select his forum. *See* Reviser's Note, 28 U.S.C. § 1404(a).

Section 1404(a) does not indicate explicitly whether, in a diversity case, the substantive law of the transferor forum or the transferee forum should provide the rule of decision. The *Erie* doctrine, which requires a federal court to apply the substantive law of its forum state, would seem, at first blush, to mandate that the transferee court look to the substantive law of *its* forum state. Thus, if a case were transferred from a district in State "A" to a district in State "B," the trial judge would look to the conflict-of-laws rules of State "B," rather than State "A," to find the rule of decision. In doing so, the judge would frustrate the plaintiff's right to select the conflict-of-laws rules applicable to the case by giving that right to the defendant who obtained the section 1404(a) transfer. This frustration of the plaintiff's right to dictate the applicable rule of decision would be the same as that which occurred prior to *Erie,* when a defendant removed a case from state court to federal court. In sum, if a transferee court applied the substantive law of its forum state, it would thwart *Erie*'s goal of preventing the "accident" of diversity of citizenship jurisdiction from leading to a different substantive result on the merits of a case contested in a federal, rather than a state, forum.

The Supreme Court solved this problem in *Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Analyzing the purposes of section 1404(a), the Court found that Congress did not intend that a defendant obtaining a transfer " 'get a change of law as a bonus for a change of venue.' " *Id.* at 636, 84 S.Ct. 819 (footnote omitted). The court therefore held that when a defendant successfully moves to have a

case transferred, the transferee court should apply the same substantive law that the transferor court would have applied, not the substantive law of the forum state of the transferee court. *See generally* Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 Cornell L.Rev. 149, 151-59 (1977).

B.

The preceding discussion illuminates two basic points relevant to the issues before us. First, the federal district court in which a plaintiff brings his state law claims will apply the substantive law of the forum state, resorting first to its conflict-of-laws rules, to decide the merits of the claims. Second, although the court may transfer the case to a district in another state, the trial judge will apply the law of the transferor's forum. Accordingly, a transfer has no effect on a plaintiff's ability to "shop" for the most favorable applicable law.[3] In the present case, therefore, transferring the case from the Northern District of Alabama to the Southern District of New York will have no effect on the outcome. The court in New York will apply Alabama law to decide whether to abide by the parties' choice-of-law clause and, if Alabama does not recognize such a provision, it will apply Alabama's conflict-of-laws rules to discover what state's law should provide the rule of decision. Similarly, the court in New York will follow the Federal Rules of Civil Procedure, just as would the district court in Alabama. Thus, recognizing that a section 1404 (a) transfer will not affect the outcome of this case, I turn to the issue of what effect the

[3]I am perplexed by Judge Godbold's concern that a difference between federal and state court treatment of forum selection clauses will lead to "the kinds of forum shopping . . . deplored in *Erie*." Post at 1077; *see also Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 651 (11th Cir.1986) (Godbold, J., dissenting), *vacated*, 785 F.2d 896 (11th Cir.1986). The forum shopping that disturbed the *Erie* Court was the ability of a plaintiff to get an entirely different result in his case, depending on whether he brought it in state or federal court. As I demonstrate in the text, the *Van Dusen* rule, requiring the transferee court to apply the same law that the transferor court would have applied, eliminates Judge Godbold's concern.

parties' choice-of-forum clause should have had on the district court's decision whether to transfer this case.

II.

A.

The Stewart Organization, Inc. (Stewart) and Ricoh Corp. (Ricoh) negotiated a contract at arms-length. The contract included a provision stating that any disputes arising out of the contract would be litigated in Manhattan and that New York law would govern the interpretation of the contract.[4] When a dispute did arise, Stewart chose to sue Ricoh in the United States District Court for the Northern District of Alabama, where jurisdiction and venue were proper.[5] Under the *Erie* doctrine, Alabama law would determine the outcome of Stewart's state law claims. If the district court found that Alabama

[4]That provision states as follows:

> 18. *General Provisions*
>
> 18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York [i.e., the United States District Court for the Southern District of New York], shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

The choice-of-forum provision must be read against the background of the Alabama rule, pronounced in *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala.1980). The effect of that rule, *see infra* Part II.C., is to create the following exception to the choice-of-forum clause: if Stewart sues Ricoh *and* a resident defendant in Alabama state court, thus precluding Ricoh from removing the case to federal court, the state court will ignore the choice-of-forum clause and proceed to litigate the case.

[5]Stewart's complaint contains federal antitrust claims against Ricoh. Ricoh does business in Alabama and New York, making venue for all of Stewart's claims statutorily proper in both the Northern District of Alabama and the Southern District of New York. *See* 28 U.S.C. § 1391 (b) & (c) (1982); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3818 (2d ed. 1986).

law would honor the contract's choice-of-law clause, New York law would, of course, dictate the disposition of Stewart's state law claims.

Ricoh, relying on the contract's forum selection clause, moved the district court to either dismiss the case for improper venue, under 28 U.S.C. § 1406(a) (1982),[6] or to transfer the case to the Southern District of New York, under 28 U.S.C. § 1404(a) (1982). Because Ricoh does business in the relevant judicial district in Alabama as well as New York, the Northern District of Alabama constituted a proper venue. *See* 28 U.S.C. § 1391(b) & (c) (1982). The district court therefore properly denied Ricoh's section 1406(a) motion to dismiss the case. Seizing on ambiguous language in an Alabama case that refused to enforce a choice-of-forum clause, *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala.1980), the district court also denied Ricoh's motion to transfer. The court read this language as declaring choice-of-forum agreements null and void and concluded that it was bound by *Erie* to ignore the clause. Because he doubted his conclusion, the district judge certified to this court the question of whether he should have transferred this case.[7] We accepted jurisdiction.

---

[6]28 U.S.C. § 1406(a) (1982) provides as follows:

Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

[7]28 U.S.C. § 1292(b) (1982) allows a district court to certify an order in a civil action that although not normally immediately appealable, involves a "controlling question of law as to which there is substantial ground for difference of opinion" and an appeal from which might materially advance the conclusion of the litigation. The former Fifth Circuit held that section 1292(b) was an appropriate method for appellate review of section 1404(a) decisions. *See Continental Grain Co. v. Federal Barge Lines, Inc.*, 268 F.2d 240, 241-45 (5th Cir.1959), *aff'd*, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960) (in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981). In addition, Ricoh could have obtained appellate review of the district court's section 1404(a) decision by seeking a writ of mandamus. *See Roofing & Sheet Metal Servs. v. La Quinta Motor Inns*, 689 F.2d 982, 987-89 (11th Cir.1982).

The panel, observing that federal venue questions are controlled by federal law, concluded that federal law should determine the enforceability of the parties' forum selection clause. The panel found no policy reason for condemning those agreements if bargained for at arms-length, as the agreement was in this case. The panel accordingly reversed the district court's decision and ordered it to transfer this case to the Southern District of New York. We took this case en banc, vacating the panel's opinion, in order to address the questions of whether, and, if so, to what extent, a district court should consider a fairly bargained for choice-of-forum clause when deciding whether to transfer a case to another forum pursuant to section 1404(a).

B.

Section 1404(a) permits a district court to transfer a case "[f]or the convenience of parties and witnesses, in the interest of justice." Here, the fact that the parties entered into a valid contract creates a conclusive presumption that Ricoh has already compensated Stewart for any inconvenience Stewart and its witnesses[8] might suffer from trying this case in New York. Furthermore, I find it self-evident that the interests of justice would best be served by respecting a valid contract.

The Supreme Court considered the effect of a choice-of-forum clause in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S.

---

[8]In theory, the parties had two categories of witnesses in mind when they negotiated the choice-of-forum provision. The first category includes witnesses over whom the respective parties exercised control and could therefore bring to trial. Ricoh has compensated Stewart for its inconvenience in transporting those witnesses to trial in New York City. The second category of witnesses consists of those not under a party's control, residing beyond the reach of a subpoena calling for the witness' appearance at trial. *See, e.g.*, Fed.R.Civ.P. 45(e). The testimony of those witnesses would have to be obtained by deposition, the expense of which would be substantially the same whether the parties were litigating in Manhattan or elsewhere.

1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). In that case, the respondent, owner of a sea-going drilling rig, contracted with the petitioner, owner of *The Bremen*, to have petitioner tow the rig across the Atlantic Ocean. The contract contained a provision that any dispute would be litigated in a specified court, in London, England. Shortly after petitioner began towing the rig, bad weather damaged the rig. The respondent sued the petitioner in admiralty in the United States District Court for the Middle District of Florida, and the petitioner sought to have the case dismissed on *forum non conveniens* grounds, relying on the choice-of-forum clause.

The district court gave no effect to the clause, concluding that to do so would permit the parties to oust the court of its admiralty jurisdiction, and denied the motion. The court of appeals affirmed. *Zapata Off-Shore Co. v. The Bremen*, 446 F.2d 907 (5th Cir.1971) (en banc) (per curiam) (adopting panel decision located at 428 F.2d 888 (5th Cir.1970)), *rev'd*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). The Supreme Court, reversing, ordered the forum selection agreement enforced, unless the respondent "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 407 U.S. at 15, 92 S.Ct. at 1916. Phrasing the question as whether the district court should have "give[n] effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause," *id.* at 12, 92 S.Ct. at 1914, the Court formulated a test for determining the enforceability of forum selection clauses in individual cases: a choice-of-forum agreement will bind the parties, unless the party opposing its enforcement can establish that the provision was the product of duress, fraud, or some other conduct the common law traditionally recognized as a defense to contract enforcement. *See id.* at 15, 92 S.Ct. at 1916. Moreover, such an agreement will bind the parties even if, at the time plaintiff institutes suit, the court happens to be the most convenient forum. The Court reasoned that when parties freely negotiate an agreement containing a forum selection

clause, one party cannot avoid that clause merely because it has become inconvenient for him to abide by it. *See id.* at 16, 92 S.Ct. at 1916-17.

Although the Court in *The Bremen* was not addressing the effect of a forum selection agreement in a section 1404(a) context, I believe that its reasoning should guide our decision. The choice-of-forum clause in the contract between Ricoh and Stewart was freely and fairly negotiated by experienced business professionals. Stewart has neither alleged nor shown the presence of fraud, duress, misrepresentation, or other misconduct that would bar the clause's enforcement. Nor has Stewart demonstrated that because of intervening and unexpected occurrences between the contract's formation and the filing of suit, the contract's purpose would be frustrated if the district court implemented the forum selection provision. Thus, this court is faced with a freely negotiated provision requiring the parties to litigate their disputes in a state or federal court in Manhattan. The law of contracts presumes that Ricoh has already compensated Stewart, through lowered costs or some other method, for any inconvenience that Stewart or its witnesses might suffer by trying this case in New York. I believe that section 1404(a)'s remaining concern, whether a transfer would be "in the interest of justice," also indisputably favors transferring this case. Where, as here, the non-movant has not shown that it would be unjust to honor a forum selection clause that it has freely given, "the interest of justice" requires that the non-movant be held to its promise.

C.

Despite the compelling reasons for the district court to give weight to the parties' forum selection clause and transfer the trial of this case, Stewart argues that the State of Alabama has a substantive rule, announced in *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala.1980), against enforcing such clauses, and that the *Erie* doctrine required the district court to apply that rule in passing on Ricoh's section 1404(a) motion to transfer. I believe that Stewart misunderstands the policy under-

lying the Alabama rule; a more thorough analysis of that policy reveals that the district court was free, under the *Erie* doctrine, to consider the forum selection clause.

In *Redwing Carriers*, the Supreme Court of Alabama refused to enforce a contractual provision calling for the litigation of disputes in Tampa, Florida. Concluding that the provision, if enforced, would completely divest the Alabama courts of jurisdiction, the court held the clause invalid as being contrary to public policy. The Alabama court reached its conclusion by noting that just as parties may not confer jurisdiction on an Alabama court, "contract provisions which attempt to limit the jurisdiction of the courts *of this state*" are unenforceable. *Id.* at 556 (emphasis added).

Redwing Carriers should have no effect on the outcome of this case; it does not provide a rule of decision. Rather, the case instructs Alabama's courts on the exercise of their jurisdiction. Thus, its rule is not binding on the federal courts under *Erie*. The supreme court's emphasis that its holding was designed to protect the jurisdiction of Alabama's courts makes clear the public policy its decision enforces. Nowhere in its opinion did the court indicate that forum selection agreements are unenforceable because they are inherently the result of coercive bargaining or overreaching. A fair reading of the *Redwing Carriers* decision simply cannot lead to the conclusion that it was handed down to protect Alabama citizens from sly negotiators; the decision merely prevents litigants from tying the jurisdictional hands of the state courts. This concern is, of course, irrelevant to the exercise of a federal district court's jurisdiction and the management of its docket.

To hold that the rationale of *Redwing Carriers* applies in a section 1404 (a) context would also raise supremacy clause concerns.[9] Alabama obviously cannot control a federal court's exercise of its own jurisdiction. In enacting section 1404 (a), Congress instructed the federal courts to transfer civil actions whenever they deem transfer appropriate. The supremacy clause prohibits Alabama from frustrating Congress' intent. To apply talismanically the *Redwing Carriers* rule would permit a state to shackle, in an unconstitutional manner, the discretion Congress gave the federal judiciary, and worse, would do so without advancing any state interest.

[9]The supremacy clause states that the "Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

III.

In the proceeding before us, the ultimate outcome of the litigation will be the same whether the case is transferred or retained. For purposes of applying substantive law, both the court in the Northern District of Alabama and the court in the Southern District of New York would act as though it were an Alabama state court. For purposes of applying procedural rules and the law of evidence, both courts are identical; each is bound to follow the federal practice. Thus, this is not a situation where the outcome of the case may differ because of the "accident" of diversity; the transfer of this case will have no greater consequence than placing the district judge, to whom this case is now assigned, in New York City rather than in Birmingham.

The parties in this case freely negotiated a reasonable choice-of-forum provision. Stewart, who brought this case in federal court, raises no meritorious defense to the clause other than an erroneous argument that we are required to ignore the agreement because Alabama would do so. I can find no valid reason that should have prevented the district court from considering the forum selection clause. Moreover, I conclude that not to transfer this case would be an abuse of discretion. I therefore join the majority's decision to reverse the district court and to order this case transferred to the Southern District of New York.

GODBOLD, Circuit Judge, dissenting, in which VANCE,

HATCHETT, CLARK and EDMONDSON, Circuit Judges, concur:

I readopt the reasons for disagreement set out in my dissenting opinion to the panel opinion, 779 F.2d 651-55, and add the following comments.

The en banc court, as did the panel, treats this matter as a dispute over "appropriate *venue*." This mischaracterization serves to oversimply the issue and to make possible a decision reached on the basis of characterization rather than by analysis.

Of course, this is a dispute over "venue" in the sense of "where shall the case be tried?" But this states only part of the question, which is: "where shall a diversity case be tried when the parties, by a choice of forum clause, have selected a place for trial (New York), and the forum state (Alabama) considers such a clause to be violative of its public policy, and under the federal statute, 28 U.S.C. § 1391, venue is appropriate in both Alabama and New York?"

The fallacy in characterizing the problem as "just a dispute over venue" is that it leads the en banc court, as it led the panel, to conclude that because there is a federal venue statute the dispute is a procedural matter and therefore a federal matter. Of course, there are federal venue statutes. The particular statute, 28 U.S.C. § 1391, identifies the courts that Congress — mindful of the convenience of the parties, (*Citizens & Southern National Bank v. Bougas*, 434 U.S. 35, 44 n. 10, 98 S.Ct. 88, 94 n. 10, 54 L.Ed.2d 218 (1977) — has defined as *suitable to hear diversity cases*. This and other venue statutes do not address the question of whether or under what circumstances a party may antecedently agree to proceed in one or another of the federal judicial districts that under the federal statutes are "suitable." *This case is not about what court is suitable. It is about an agreement to choose between suitable courts.*

The matter before us is not, as stated by the panel and restated by the en banc court, a matter of negating the federal venue statute. The venue statute is fully vindicated. Venue exists in both courts. The issue before us concerns a contract between parties relating to which of two acceptable federal

places of trial (as established by the federal venue statutes) shall be utilized. No federal law answers this question. The bargain reached by the parties choosing between two courts each defined as "suitable" under 28 U.S.C. § 1391 is of no federal concern. It is a matter of state contract law, and the forum state's policy should be recognized.

The en banc court suggests that Alabama policy is directed to protecting the jurisdiction of its courts rather than protecting its citizens. The only way the state's interest can be vindicated is through parties' raising the issue. As a result of the en banc decision the state courts will go in one direction and the federal another, which takes litigants back to the kinds of forum shopping described in my dissent, 779 F.2d at 651, and deplored in *Erie*.

The STEWART ORGANIZATION, INC., a corporation; Walter H. Stewart, and James S. Snow, Jr., Plaintiffs-Appellees,

v.

RICOH CORPORATION, a corporation, Ricoh of America, Inc., a corporation, Defendants-Appellants.

No. 85-7231.

United States Court of Appeals,
Eleventh Circuit.

March 14, 1986.

Appeal from the United States District Court for the Northern District of Alabama.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 10, 1986, 11th Cir., 1986, 779 F.2d 643)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges and TUTTLE, Senior Circuit Judge.*

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The previous panel's opinion is hereby VACATED.

The Clerk will specify a briefing schedule for the filing of en banc briefs.

*Senior Circuit Judge Elbert P. Tuttle has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. 46(c).

The STEWART ORGANIZATION, INC., a corporation; Walter H. Stewart, and James S. Snow, Jr., Plaintiffs-Appellees,

v.

RICOH CORPORATION, a corporation, Ricoh of America, Inc., a corporation, Defendants-Appellants.

No. 85-7231.

United States Court of Appeals,
Eleventh Circuit.

Jan. 10, 1986.

Rehearing En Banc Granted
March 14, 1986.*

Alabama copy machine dealer brought diversity action against New York manufacturer, alleging breach of contract, breach of warranty, fraud, and federal antitrust violations. The United States District Court for the Northern District of Alabama, William M. Acker, Jr., J., denied manufacturer's motion to enforce contractual forum selection clause, and manufacturer petitioned for permission to appeal. The Court of Appeals, Johnson, Circuit Judge, held that: (1) general enforceability of contractual choice of forum clauses in federal diversity cases is resolved by reference to federal law; (2) contractual choice of forum clause in favor of New York forum was enforceable; and (3) forum selection clause controlled forum for trying all disputes arising out of or in connection with dealer-manufacturer relationship.

Reversed and remanded with instructions.

Godbold, Chief Judge, filed dissenting opinion.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

*Opinion vacated.

JOHNSON, Circuit Judge:

This case represents another episode in a dialectic that has engaged the federal courts for fourteen decades – the precise scope of the laws governing federal court decisions in diversity actions. Specifically, this case requires us to decide whether a freely negotiated contractual choice of forum clause is enforceable in diversity actions in federal court when the forum state considers such clauses to be violative of public policy. For the reasons explained herein, we find that such clauses present procedural questions to be resolved by federal law independent of forum state policy. Accordingly, we REVERSE the judgment below and REMAND WITH INSTRUCTIONS to transfer this case to an appropriate forum.

I. BACKGROUND.

Appellant Ricoh Corporation is a nationwide manufacturer of copy machines with headquarters in New Jersey and with significant corporate operations conducted in Manhattan.[1] The appellee, The Stewart Organization, is a closely held corporation in Birmingham, Alabama, that engages in a variety of entrepreneurial endeavors. The chief figures in appellee's operations are controlling shareholders Walter H. Stewart and James S. Snow, Jr. Stewart is evidently a man afflicted with the Midas touch. He is a certified public accountant of fifteen years standing, is senior partner in a major Birmingham firm, and has been in and out of several ventures, each turning multimillion dollar profits. He purchased a failing local copying business and took it from $750,000 indebtedness to sales of $1.8 million in one year.

Due to dissatisfaction with the Savin machines the Organization sold, Stewart entered into negotiations with appellant to

[1]The appellee claims that this information is based on hearsay testimony that was stricken from the record. While the court below did strike the affidavit of John E. Stuart, it is not clear whether the order to strike was of his entire testimony or only the hearsay segments. The matters related here regarding corporate and document location do not appear to be hearsay.

become a dealer for Ricoh in central Alabama. After lengthy negotiations, Mr. Bob Banks of Ricoh presented Mr. Stewart with a printed "Dealer Sales Agreement" contract. While certain blank spaces in the contract were filled in by Banks with Stewart's acquiescence, Stewart did not bother to read Paragraph 18.1 of the contract (nor, apparently, any of the other printed language) which contained a choice of law clause and a choice of forum clause in favor of New York law and a Manhattan forum respectively.[2] Banks stated that the contract was standard and no changes of substance would be permitted, and he pushed Stewart to sign it so that Banks could catch his plane back to Atlanta. Stewart never did read the clause until his counsel pointed it out to him prior to this suit.

On September 28, 1984, appellee filed this action in the United States District Court for the Northern District of Alabama alleging breach of contract, breach of warranty, fraud, and federal antitrust violations arising out of the dealer-manufacturer relationship between Ricoh and the Stewart Organization. The action was based on diversity and federal question.

In response to this complaint, the appellant filed motions to dismiss and to transfer on grounds of improper venue and inconvenient forum, pointing to the choice of law and forum selection clauses of Paragraph 18.1 of the contract. Following briefing and oral argument, the trial court denied the appellant's motions on January 29, 1985. The court refused to enforce the clauses because it was of the opinion that state law governed the enforceability of a forum selection clause (which Alabama law deems contrary to public policy) and because the forum clause did not embrace all of the appellee's claims, meaning transfer would split the case. This interlocutory ap-

[2] 18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

peal comes by certification of the district court under 28 U.S.C. § 1292(b).[3] We granted the petition for permission to appeal.

II. ANALYSIS.

This appeal raises three issues: A) whether federal or state law governs the enforceability of a forum selection clause; B) whether this particular forum selection clause is unenforceable as unreasonable or overreaching; and C) whether this particular clause has sufficient scope to transfer all claims to a New York court.[4] These issues are purely legal and accordingly are subject to plenary review by this Court. *Cathbake Inv. Co. v. Fisk Elect. Co.*, 700 F.2d 654, 656 (11th Cir.1983).

A. Federal or State law?

Since *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842), federal courts have been ensnared by an intellectual tar baby. They have wrestled, never wholly successfully, with the sticky question of which law, state or federal, will govern various aspects of the decisions of federal courts sitting in diversity.[5] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 73, 58 S.Ct. 817, 819, 82 L.Ed. 1188 (1938), Justice Brandeis writing for the

---

[3] When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order. . . .

[4] The appellant in its brief raised a fourth issue, whether this court has jurisdiction over the motion to dismiss, arguing that such a motion is not final and hence not appealable under 28 U.S.C.A. § 1292(a). But this matter comes to us under § 1292(b) and hence is not governed by the final judgment rule applicable to Subsection (a). Appellant's counsel conceded this at oral argument and indicated that they no longer contest this issue.

[5] As Justice Harlan observed, "*Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions." *Hanna v. Plumer*, 380 U.S. 460, 474, 85 S.Ct. 1136, 1145, 14 L.Ed.2d 8 (1965) (Harlan, J., concurring).

Court, overruled *Swift* and held that federal courts in diversity actions "would apply as their rules of decision the law of the State, unwritten as well as written." The decision sought to reflect properly the distribution of judicial power between two sovereigns; it was a recognition that one concomitant of our federalism is the need for special care at the intersection of state and federal sovereignty.

Though *Erie* spoke in language plain and firm, directing that henceforth in diversity a federal court would act merely as another court of that state, Justice Reed's concurrence suggested that the scope of *Erie* was delimited. While decisions in diversity were to be governed by substantive state law, yet "no one doubts federal power over procedure." *Id.* at 92, 58 S.Ct. at 828. The Supreme Court and inferior courts have grappled with this dichotomy ever since.

The distinction between substance and procedure, sad to say, proved little more than gossamer, for "[e]ach [term] implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945). Since this mechanical distinction proved unwieldy and unpredictable, Justice Frankfurter crafted a new approach in his opinion for the Court in *Guaranty Trust*. The premise of *Erie*, he reasoned, was that parties litigant should not be able to undermine policy choices of the forum state merely by crossing the street from the state to the federal courthouse. Federal courts sitting in diversity should resolve questions so that "the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* Thus, the "outcome determinative" test was launched.

Nine years' experience with this rule showed it to be harsh and unworkable. It gave too little deference to the validity of federal interests and constricted the function of the federal court system as an independent source of relief. In response, the Court held in *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525, 537-39, 78 S.Ct. 893, 900-01, 2 L.Ed.2d 953

(1958), that determining which rules were to govern required balancing the federal interest in uniform process against the state interest in uniform results. The former Fifth Circuit found the former more important, *Monarch Ins. Co. of Ohio v. Spach*, 281 F.2d 401, 408 (5th Cir.1960), but other courts came to a contrary conclusion. *Allstate Ins. Co. v. Charneski*, 286 F.2d 238, 244 (7th Cir.1960).

Still unsatisfied, the Supreme Court turned to this vexing question yet again in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). To the extent that Congress has enacted federal procedural rules (and implicitly federal statutes governing federal court procedure), the question is governed by federal law. "[T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.* at 472, 85 S.Ct. at 1144.[6] State policy to the contrary, even if arguably substantive, is simply overridden.

With *Hanna* as our guide, we may descend from these rarefied heights to the facts of this case. The issue here is the enforceability of choice of forum and choice of law clauses freely adopted in arm's-length contractual negotiations. New York permits both; Alabama permits only contractual choice of law clauses. *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554, 556 (Ala.1980); *Goodwin v. George Fischer Foundry Systems, Inc.*, 769 F.2d 708, 712 (11th Cir.1985). Since it is clear by the terms of the contract that New York law will govern the underlying dispute, there is no question that, to the extent *Guaranty*

[6]Though *Hanna* dealt primarily with the status of the Federal Rules of Civil Procedure under *Erie*, Chief Justice Warren's opinion for the Court also considered "the typical, relatively unguided *Erie* choice", 380 U.S. at 471, 85 S.Ct. at 1144, and recognized that the outcome determinative approach of *Guaranty Trust* was unworkable save when viewed in conjunction with "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468, 85 S.Ct. at 1142.

Trust retains viability, the resolution of the choice of forum question will not affect the substantive outcome of the case. Both New York and Alabama would apply New York law.

We thus must simply decide whether these two parties may choose the courts of Manhattan as the appropriate venue.[7] The appellant suggests that the question is governed by the opinion of the former Fifth Circuit in *In re Fireman's Fund Ins. Co., Inc.*, 588 F.2d 93 (5th Cir.1979), and by *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Both of these cases are instructive in that they stand firmly behind the enforceability of choice of forum clauses unless unreasonable under the circumstances. But while these cases inform us as to general policy, they are of only limited help on the question whether state or federal law governs enforceability in diversity actions because both arose under statutes creating exclusive federal jurisdiction. *Fireman's Fund* was decided under the Miller Act and *The Bremen* was an admiralty case.

We hold that venue in a diversity action is manifestly within the province of federal law; under *Hanna* we do not properly look to Alabama law for its resolution. This conclusion is dictated by statute and binding precedent. That venue is a question of federal procedure is manifest in two ways. First, Con-

[7]Though Alabama decisions attempt to conflate the concepts, *see Redwing Carriers*, 382 So.2d at 556, jurisdiction and venue are distinct. Subject matter jurisdiction refers to the institutional power of a court to adjudicate a case; venue dictates which among several courts having jurisdiction is appropriate as most convenient. A court must be seized of both jurisdiction and venue if properly to hear a case. *Robertson v. Railroad Labor Brd.*, 268 U.S. 619, 623, 45 S.Ct. 621, 623, 69 L.Ed. 1119 (1925); F. James & G. Hazard, Civil Procedure 617 (2d ed. 1977). Subject matter jurisdiction cannot be created by contract, *Jackson v. Ashton*, 33 U.S. (8 Pet.) 148, 149, 8 L.Ed. 898 (1834); venue can, *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168, 60 S.Ct. 153, 154, 84 L.Ed. 167 (1939).

There is no question here that Alabama courts have jurisdiction; the only question is whether they are the appropriate venue. Venue is generally governed by residence. When a corporation is a defendant it is generally deemed a resident wherever it does business. F. James & G. Hazard, *supra* at 618.

gress has specifically provided, by statutory enactment, rules of venue to govern federal district courts in diversity actions. 28 U.S.C.A. §§ 1391, *et seq.* (1985). By making specific provision, rather than leaving rules of venue to be governed by state common law, the statute makes clear that Congress considered this a question appropriately governed by federal legal standards. Second, Congress has permitted the adoption of Fed.R.Civ.P. 12(b) (3) and 41(b), further evidence that federal court venue is governed by federal law. Together these enactments make clear that, under the Supreme Court's reasoning in *Hanna*, Alabama policy is not controlling. 380 U.S. 472, 85 S.Ct. 1144.[8]

Further, though neither the parties nor the court below seem to have noticed it, this question has already been decided by the Supreme Court. In *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), the Court considered a case arising in diversity where Michigan residents leased farm equipment from a New York-based company. The contract contained in fine print choice of forum and choice of law clauses, both in favor of New York. The Szukhents did not read this provision. The Court held the

[8]Some would suggest that this case ought to be controlled by *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). We do not agree. The *Erie* Doctrine and its substance/process distinction left unresolved the question whether state or federal choice of law rules, ordinarily viewed as procedural, were to govern actions in diversity. In *Klaxon*, the Court held that the rules of the state in which the federal court sat were controlling, even at the expense of inconsistency within the federal court system. *Id.* at 496, 61 S.Ct. at 1021. *Klaxon's* viability was reaffirmed in *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4, 96 S.Ct. 167, 168, 46 L.Ed.2d 3 (1975) (*per curiam*) where the Supreme Court summarily reversed the former Fifth Circuit, warning us that a "federal court in a diversity case is not free to engraft onto those state [conflict of law] rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."

The issue in this case, however, is *not* the legitimacy of a choice of *law* clause. Both states permit such clauses. Rather we are asked to enforce a choice of *forum* clause. For the reasons we explain above, the contractual selection of a forum is a choice of venue that is clearly governed by federal statute and case law. *Klaxon* is simply inapposite.

clause enforceable because "it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . ." *Id.* at 315-16, 84 S.Ct. at 414. While the main issue in the case was the propriety of another clause designating a New York agent for service of process, the Court upheld the clause in all respects without reference to either New York or Michigan law.[9] The facts of *Szukhent* are obviously analogous to those before us today, and we see no principled basis for avoiding the import of its holding.

Beyond *Szukhent*, we this year decided *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231 (11th Cir.1985) (*per curiam*). We there considered in diversity a contractual forum selection clause that referred the case to Brazil. We held that, because the language of the clause was ambiguous as to whether it vested venue solely or concurrently in Brazil, an American court could entertain the suit. But our analysis as to the enforceability of the clause turned on the principles of reasonableness articulated in *The Bremen*. *Id.* at 1232. State law was not considered. *Accord, Coastal Steel v. Tilghman Wheelabrator*, 709 F.2d 190, 201 (3d Cir.) ("The Supreme Court in *The Bremen* and in *Scherk* [*v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)] appears to have assumed without saying so that in a federal forum the enforceability of a forum selection clause is determined by a generally applicable federal law"), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349-50, 78 L.Ed.2d 315 (1983); *Bense v. Interstate Battery System of America*, 683 F.2d 718, 721-22 (2d Cir.1982) (expressly declining to use Texas venue law, which disfavored forum selection clauses, to undo contractual agreement); *Pelleport In-*

[9] "The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. The contract specifically [so] provided. . . . And it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . ."

375 U.S. at 315-16, 84 S.Ct. at 414.

vestors v. Budco Quality Theatres, 741 F.2d 273, 279-80 (9th Cir.1984); *Snyder v. Smith*, 736 F.2d 409, 419-20 (7th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 513, 83 L.Ed.2d 405 (1984). *But cf., Mercury Coal & Coke v. Mannesmann Pipe & Steel*, 696 F.2d 315, 317 (4th Cir.1982) (*dictum* noting that West Virginia law favors forum selection clauses).

The appellee offers a number of cases that it claims stand for the proposition that the enforceability of a contractual choice of forum clause is substantive and hence in diversity governed by the law of the forum state. This argument is based on the wooden substance/process test that *Hanna* discarded. Whether a state policy will override a federal interest is a different question, not so facilely resolved, governed by the factors we noted at footnote 6. To the extent state law factors into the analysis of those cases, it goes to issues independent of the enforceability of the choice of forum clause. Even if the cited cases are correct, none is binding for all come from the district courts of other circuits, and we would read them as inconsistent with binding precedent.

In sum, we hold that the general enforceability of contractual choice of forum clauses in federal diversity cases is resolved by reference to federal law. We turn next to the question whether this particular clause is enforceable under operative principles of federal law.

B. Enforceability of this clause.

The seminal case on enforceability of contractual choice of forum clauses is the Chief Justice's opinion in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). The Court in exceptionally strong language banished the former bias against such clauses and directed that in almost all circumstances enforcement of such provisions is favored. "The correct approach [is to] enforce the forum clause specifically unless [the adverse party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15, 92 S.Ct. at 1916. The Court held the clause enforceable even

though the adverse party claimed not to have read it before signing the agreement. *Id.* at 14 n. 16, 92 S.Ct. at 1915 n. 16.

As to "unreasonable or unjust," the Court identified two factors that might justify refusing to enforce a clause. First, we should decline enforcement if it "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 15, 92 S.Ct. at 1916. At first glance this appears to support appellee's contention that we should not enforce the clause as contrary to Alabama law. But the concern is with policies of the *forum* (i.e. federal court) rather than of the state. We see no other reasonable way to reconcile this language with the case law and with Congressional enactments. If venue were to be governed by the law of the state in which the forum court sat, the federal venue statute would be nugatory. Nor would there be any legitimacy to the Federal Rules that govern certain aspects of venue, for they would tread on state prerogatives. *Hanna* clearly rejected this notion. So long as enforcement is consistent with substantive federal law, and with the decisions of this Circuit, the clause is not in conflict with the public policy of the forum. That is the case here.

Second, a court may decline to enforce the clause as unreasonable "if the chosen forum is *seriously* inconvenient for the trial of the action." 407 U.S. at 16, 92 S.Ct. at 1916. (emphasis in original). The party seeking to escape the application on convenience grounds must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Id.* at 18, 92 S.Ct. at 1917.

This is an exceptionally heavy burden and the appellee does not meet it. There is no evidence of inconvenience of the sort contemplated in *The Bremen*. As to the need to bring papers and witnesses to New York, regardless of whether the case is tried in Alabama or New York one party will be inconvenienced. "[T]he question is which party it should be." Bril-

mayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup.Ct.Rev. 77, 92. Of necessity "[e]very contract is the acceptance of some inequality — and under our decisions . . . it cannot be denied that the plaintiff . . . did contract." *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 498, 47 S.Ct. 678, 681, 71 L.Ed. 1165 (1927) (Holmes & Brandeis, JJ., dissenting). We must give both parties the benefit of their bargain, which was to put the burden of litigation in a foreign forum on the appellee.

Nor is there any meaningful showing that appellee would be denied its day in court. The only evidence in the record is the statement of Mr. Stewart that he could not afford to pursue his claim in New York. This does not obtain. Mr. Stewart is a wealthy man. Further, his expenses would presumably be absorbed by the real party in interest, The Stewart Organization as a corporate entity. There is no record evidence to suggest that the corporation is unable to afford the costs of litigation in the Empire State.

As to its claim of fraud and overreaching, the appellee spends considerable words to the effect that Mr. Stewart, as its representative, is a poor, ignorant person bulldozed into signing this contract by a pushy salesman. The facts belie this. Mr. Stewart is savvy; his Organization is large and successful. It was turning $1.8 million in annual sales of Savin products when it switched to Ricoh. Mr. Stewart is not the Michigan dirt farmer in *Szukhent*. If he was dissatisfied with the terms of the contract or felt the Ricoh representative was pushing too hard, he could have simply walked away from the bargaining table.

Nor may we release him because he did not read the boilerplate. "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written." *Upton v. Tribilcock*, 91 U.S. (1 Otto) 45, 50, 23 L.Ed. 203 (1875). Failure to read fine print will not save one from the results of his carelessness. *Quality Foods, Inc. v. U.S. Fire Insurance Co.*, 715 F.2d 539,

542 (11th Cir.1983); *Century Plaza v. Hibbett Sporting Goods, Inc.*, 382 So.2d 7, 8-9 (Ala.1980). This case is, in short, an "arms-length negotiation by experienced and sophisticated businessmen and [because there is absence of] some compelling and countervailing reason it should be . . . enforced by the court[]." *The Bremen*, 407 U.S. at 12, 92 S.Ct. at 1914.[10]

C. The Scope of the Forum Selection Clause.

The court below was concerned that the forum clause would "not control the forum for trying those counts or causes of action which are not contractual in nature, so that a transfer of the causes insofar as based on claims of breach of contract would simply split the controversy between forums and waste judicial resources." This goes to the allegations of breach of warranty, fraud, and the antitrust claims.

There is no basis for finding that where parties contract a choice of forum the agreement governs only disputes directly under the contract. There are no cases of which we are aware where courts enforcing such clauses have divided expressly contractual disputes from the claims pendent to or arising out of the contractual relationship. Nor have courts refused to enforce a forum agreement because in transferring the controversy some issues would be left in the forum of first instance. On the other hand, in *Bense* the Second Circuit read the language of a forum selection clause that encompassed actions arising "directly or indirectly" from the contract as permitting the court to order transfer of the *entire* case, including the antitrust claims.[11] 683 F.2d at 720.

This is the better policy and we adopt it as our own. If we are to be true to the Supreme Court's directive in *The Bremen*

---

[10]Nor is the contract sufficiently ambiguous to come under the language of *Citro Florida*. The contract states clearly that New York law governs and that New York is the "exclusive" forum. It admits of no exception, while in *Citro Florida* that clause merely said that Brazil was a place of jurisdiction.

[11]"Although the complaint was brought pursuant to federal antitrust law, the gist of Bense's claim is that Interstate wrongfully terminated the agreement, thereby damaging Bense." 683 F.2d at 720.

to encourage commercial reliance on forum selection clauses, then we must decline the adoption of a crabbed, narrow limit on controversies subject to transfer for that would completely undo the usefulness of these agreements. It is difficult to imagine a commercial case where contractual issues could not and would not be intertwined with claims in tort or criminal or antitrust law. To so hold would be to revive the ancient distinction between forms of action long since abandoned as a mere vestige of English common law.

It is clear from the language of the agreement that it anticipated that *any* dispute arising out of or in connection with the dealer-manufacturer relationship was to be governed by the clause. Of necessity this includes causes of action arising directly from the contract and those causes concomitant. There is no logical reason not to give these parties the benefit of their bargain, nor is there any legal principle or precedent of which we are aware that dictates a contrary result.

III. CONCLUSION.

For the reasons foregoing, we find the choice of forum clause in this contract is in all respects enforceable generally as a matter of federal law and specifically within the confines of this case. The judgment of the district court is accordingly REVERSED and this case is REMANDED with instructions to transfer this action to an appropriate court in the City of New York and the Borough of Manhattan.

GODBOLD, Chief Judge, dissenting:

Whether state or federal law is to control the enforcement of choice-of-forum clauses in diversity cases is a difficult question. I am not able to agree with the majority's analysis.

The issue here is within the twilight zone between substance and procedure that has troubled federal courts since the decision of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The enforceability of contract provisions is typically an issue of substance which a federal court sitting in its diversity jurisdiction must decide according to

state law. The correctness of venue in the federal court system is, on the other hand, a procedural matter that is governed by federal statute and rules of procedure. The majority correctly point out that the imprecise labels "substance" and "procedure" do not take us very far in this case.

Alabama law is adverse to clauses, such as the one at issue here, which seek to limit "to a specified place" suits arising from future events. *See Redwing Carriers, Inc. v. Foster,* 382 So.2d 555, 556 (Ala.1980). Were Alabama law flatly in conflict with a constitutionally sound federal statute or rule of procedure, our inquiry would be at an end. This is not the case, however. The conflicting federal rule is decisional, *see The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), and does not derive in any evident way from the constitution or federal statute.[1] This is therefore one of the "typical, relatively unguided" *Erie* choices that must be guided by "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer,* 380 U.S. 460, 468, 471, 85 S.Ct. 1136, 1142, 1144, 14 L.Ed.2d 8 (1965).

Applying a federal rule to choice-of-forum clauses will create an incentive for out-of-state plaintiffs to shop between state court and the local federal court. Assume that Ricoh, rather

---

[1] *The Bremen* was an admiralty case dealing with an international transaction. Although the Supreme Court has applied *The Bremen* in a non-admiralty case, *see Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1972), it did so in an international context. Facilitation of international trade was a policy concern extensively discussed by the Court both in *The Bremen,* 407 U.S. at 8-15, 92 S.Ct. at 1912-16, and in *Scherk,* 417 U.S. at 516-19, 94 S.Ct. at 2455-57. This circuit has applied *The Bremen* in an international context, *Citro Florida, Inc. v. Citrovale, S.A.,* 760 F.2d 1231 (11th Cir.1985) and in a domestic case where the issue raised was founded on federal question jurisdiction, *In re Firemen's Fund,* 588 F.2d 93 (5th Cir.1979). As one Commentator has noted, many of the courts that have applied *The Bremen* in domestic diversity cases have done so in the absence of a conflicting state rule, and have therefore not addressed the very real *Erie* problem that arises in the domestic context. *See Gruson, Forum-Selection Clauses in International and Interstate Commercial Agreements,* 1982 U.Ill.L.Rev. 133, 154-55.

than Stewart, had been first to file suit in this dispute, and assume that the choice-of-*law* clause was not enforceable under Alabama law. If Ricoh found the law of Alabama more to its liking than that of the contracted-for forum, it could choose that law by filing suit in Alabama state court. The "one-way" nature of the federal removal statute, 28 U.S.C. § 1441(b) would block the Alabama defendant's access to the local federal forum that would enforce the venue clause. This is exactly the sort of situation deplored by the Court in *Erie*. *See* 304 U.S. at 74-75, 58 S.Ct. at 820.

Were forum-shopping the only concern underlying *Erie* this would conclude the inquiry in favor of applying the state rule. Many courts have, however, supplemented the limited guidance given by *Hanna* with an analysis that balances the applicable state and federal interests. *See* C. Wright, *The Law of Federal Courts* 386 (1984); *see also, Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). Careful analysis under *Byrd* also requires us to apply state rather than federal law. I preface this analysis with an examination of the treatment of two other familiar contractual devices.

Choice-of-forum clauses are often found together with two other similar but legally distinct types of clause. One type is the choice-of-law clause; the other, the consent-to-personal-jurisdiction clause. The enforceability of choice-of-law clauses, like choice-of-law matters generally, is governed by state law in diversity cases. *See Klaxon v. Stentor*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). The enforceability of consent-to-personal-jurisdiction clauses in diversity cases is likewise a state law matter, just as personal jurisdiction in a federal court is generally decided by reference to the law of the state in which the federal court sits. *See Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 444 (5th Cir.1979).

National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), is not to the contrary. *Szukhent* decided the meaning of the term "agent authorized by appointment . . . to receive service of process" under F.R. Civ.P. 4; it did not hold that such appointment plus service

suffices to confer jurisdiction over the person. *Szukhent* did note in passing that the appointment-of-agent clause in the contract there was intended to constitute submission to personal jurisdiction in New York, and noted that such agreements had been regularly upheld, but the Court did not decide that validity and effect were governed by federal not state law. *See id.* at 315-16, 84 S.Ct. at 414; *see also id.* at 321-22 (Black, J., dissenting); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075 at 310 n. 51 (1969). I cannot agree with the majority either that the Court decided that the appointment-of-agent clause was effective as a consent to personal jurisdiction — for that issue was not before the Court — or that it upheld the clause "in all respects" without reference to state law. *See id.* at 316-17, 84 S.Ct. at 414-15.

Against this background, a holding that federal law is to govern the enforceability of choice-of-forum clauses is anomalous. Federal courts may be called upon to construe contractual language that appears to have been intended to waive objections both to personal jurisdiction and to venue, and perhaps to application of particular law as well.[2] I see no justificaion for applying a federal rule to the venue aspect of such a clause and state law to the rest. The more coherent approach would be to apply state law to the entire contract.

It is true that there are federal venue statutes but no federal statutes governing choice-of-law or personal jurisdiction in diversity cases. The anomaly noted above might vanish if the

---

[2]For example, the following clause is the subject of an appeal pending before this circuit, *Lee Myles Assoc. Corp. v. Connor*, 85-5059:

> *New York Interpretation.* This argument [sic] is being executed in the City and State of New York and shall be construed by and governed as to both form, substance and procedure, and rights and remedies, solely by the laws of the State of New York and in the Supreme Court of the State of New York for the County of New York.

This language is said by one party to be merely a choice-of-law provision, while the other party argues that it determines both choice-of-law and choice-of-forum. *Cf. Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 167-68, 175, 60 S.Ct. 153, 158, 84 L.Ed. 167 (1939) (consent to venue and consent to personal jurisdiction).

venue statutes could bear the weight that the majority would place upon them, but they cannot. The venue statutes serve to identify the courts that Congress – mindful of the convenience of the parties, *Citizens & Southern National Bank v. Bougas*, 434 U.S. 35, 44 n. 10, 98 S.Ct. 88, 94 n. 10, 54 L.Ed.2d 218 (1977) – thought suitable to hear diversity cases; they do not address the question whether or under what circumstances a party will be deemed to have antecedently consented to proceed in one or another of the districts in which venue is properly laid.[3] Moreover, the venue statutes themselves leave important blanks to be filled in by reference to state law, e.g., what is "a claim" and where a corporation is "incorporated or licensed to do business." 28 U.S.C. § 1391. Thus the venue statutes do not express a wider federal interest that displaces state law in this area.[4]

---

[3]Nor do the venue statutes address the question of what constitutes waiver of objections to venue in the state courts of another state. The contractual provision at issue here speaks of "any appropriate *state* or federal district court located in the Borough of Manhattan, New York City, New York . . ." Record at 29 (emphasis added). It is difficult to understand what federal purpose is served by refusing to apply state law to this aspect of the clause.

[4]*Brown v. Pyle*, 310 F.2d 95 (5th Cir.1962), applied *Byrd* and *Olberding v. Illinois Central R. Co.*, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953), and found that the policy underlying the then federal venue statute outweighed the state interest embodied in a state non-resident motorist statute. The non-resident motorist statutes in *Pyle* and *Olberding* would have laid venue in a district where venue was improper under the federal statute. Here, venue in the Alabama district court is proper under § 1391. *Olberding* made it impossible for a federal court in which a claim had arisen to hear a case over objection if neither all plaintiffs nor all defendants resided there. Unhappiness with the result in *Olberding* eventually led to the adoption of the "where the claim arose" provision of the present § 1391(a). *See generally* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3806 at 25-27 (1976).

Other authorities of the circuit that assign a preponderant weight to a federal interest, e.g., *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir.1969) (en banc); *Monarch Ins. Co. v. Spach*, 281 F.2d 401 (5th Cir.1960), emphasize the importance of a uniform federal trial procedure. The present issue is one that must be determined before trial and pretrial proceedings begin.

Having canvassed the federal interests present, I turn to state policy. *Redwing Carriers* is the initial Alabama case on non-enforcement of a choice-of-forum clause. While state policies are little discussed, the court's promulgation of an Alabama rule is not mistakable. Moreover, the use of boilerplate choice-of-forum clauses to require the unsuspecting to litigate in a distant forum is a sharp practice that has been widely criticized. *See, e.g., Szukhent*, 375 U.S. at 325-33, 84 S.Ct. at 419-23 (Black, J., dissenting). Alabama has fashioned a rule, as it is entitled to do under our system of federalism. Applying principles of federalism correctly, we should respect the state's decision.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STEWART ORGANIZATION, INC., et al.,	)	
PLAINTIFFS	)	
VS.	)	CIVIL ACTION NO. 84-AR-2460-S
RICOH CORPORATION, et al.,	)	
DEFENDANTS	)	

ENTERED JAN. 29, 1985

ORDER

The court has for consideration defendants' motion to dismiss or to transfer the above entitled cause to the United States District Court which sits in the Borough of Manhattan, New York City, New York. The court has read the briefs submitted by plaintiffs and by defendants, and concludes that defendants' motion is due to be denied for the following separate and several reasons:

1. Considering the issues, an Alabama forum is no less convenient to the parties than a New York forum, and perhaps more convenient.

2. The "boilerplate" provision of the contract here involved which purports to pre-select a forum should not control the forum for trying those counts or causes of actions which are not contractual in nature, so that a transfer of the causes insofar as based on claims of breach of contract would simply split the controversy between forums and waste judicial resources.

3. The court looks to the place of the formation and execution of the contract, and where the material events took place,

i.e., Alabama, for the law for determining the forum, and Alabama clearly does not favor forum selection clauses in contracts.

4. The authorities cited by defendants are all distinguishable.

Defendants' motion is DENIED, and defendants are granted 15 days within which to answer.

DONE this 29th day of January, 1985.

/s/ WILLIAM M. ACKER, JR.

William M. Acker, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7231

D.C. Docket No. 84-2460

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,

Plaintiffs-Appellees,

versus

RICOH CORPORATION, a corporation, RICOH OF AMERICA, INC., a corporation,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

---

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges, and TUTTLE*, Senior Circuit Judge.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, RE-

*TUTTLE, Senior Circuit Judge, has elected to participate in further proceedings in this matter pursuant to 28 U.S.C. 46(c).

MANDED to said District Court with instructions to transfer this action to an appropriate court in the City of New York and the Borough of Manhattan, in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

GODBOLD, Circuit Judge, dissented and filed an opinion in which VANCE, HATCHETT, CLARK and EDMONDSON, Circuit Judges, concurred.

TJOFLAT, Circuit Judge, specially concurred and filed an opinion, in which KRAVITCH and ANDERSON, Circuit Judges, concurred.

Entered: February 23, 1987
For the Court: Miguel J. Cortez, Clerk

By: /s/ DAVID MALAND
Deputy Clerk

ISSUED AS MANDATE: MAR. 19, 1987

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SCOTT M. PHELPS*
RALPH H. YEILDING
Counsel for Respondents, Ricoh Corporation and Ricoh of America, Inc.

*Counsel of Record

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

QUESTION PRESENTED FOR REVIEW

In deciding whether or not to transfer a case to another federal forum pursuant to 28 U.S.C. § 1404(a), is a federal district court exercising both federal question and diversity jurisdiction controlled by a state's rule against enforcing choice-of-venue agreements?

INFORMATION REQUIRED BY RULE 28.1

Respondent, Ricoh Corporation was formerly known as Ricoh of America, Inc. It is a subsidiary of Ricoh Company, Ltd., and has two subsidiaries of its own, Ricoh Electronics, Inc. and Ricoh Corporation (Canada), Ltd. The subsidiary known as Ricoh Electronics, Inc. also has two subsidiaries, Ricoh Development of California, Inc., and Ricoh Thermal Systems, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

INFORMATION REQUIRED BY RULE 28.1 ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. The Eleventh Circuit Correctly Applied *Erie* And Other Applicable Decisions Of This Court 3

II. Enforcement Of The Disputed Choice-of-Venue Clause Offends No Applicable State Public Policy 7

III. The Conflict Among The Courts Of Appeals Asserted By Petitioners Is More Imagined Than Real 10

IV. Any Need To Decide The Issue Presented Is Obviated By The Overwhelming Trend In The State Courts Favoring Enforcement of Choice-of-Venue Agreements 13

CONCLUSION 15

APPENDIX A-1

TABLE OF AUTHORITIES

Cases	Page(s)
Alwinseal, Inc. v. Travelers Indemnity Co., 61 A.D.2d 803, 402 N.Y.S.2d 33 (1978)	10
AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148 (2d Cir. 1984)	11
Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982)	11
Blalock v. Perfect Subscription Company, 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979)	9
Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U.S. 436 (1920)	7
Bryant Electric Co., Inc. v. City of Fredricksburg, 762 F.2d 1192 (4th Cir. 1985)	11
Byrd v. Blue Ridge Electric Cooperative, 356 U.S. 525 (1958)	6
Callanan Industries, Inc. v. Sovereign Construction Co., Ltd., 44 A.D.2d 292, 354 N.Y.S.2d 486 (1974)	10
Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985)	11
Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage, 735 F.2d 380 (9th Cir. 1984)	12
Craig v. Bemis Company, Inc., 517 F.2d 677 (5th Cir. 1977)	9

Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen, 387 U.S. 556 (1967)	5
Ex Parte Collett, 337 U.S. 55 (1949)	5
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	*passim*
Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986)	11
Fireman's Fund American Insurance Cos. v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294 (1st Cir. 1974)	11
General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986)	12,13
Goodwin v. George Fischer Foundry Systems, Inc., 769 F.2d 708 (11th Cir. 1985)	9
Guaranty Trust Co. v. York, 326 U.S. 99 (1945)	6
Hanna v. Plumer, 380 U.S. 460 (1965)	5,6
Hauenstein & Bermeister, Inc. v. Met-Fab Industries, Inc., 320 N.W.2d 886 (Minn. 1982)	13,14
In Re Fireman's Fund Insurance Cos., Inc., 588 F.2d 93 (5th Cir. 1979	11
LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4 (1st Cir. 1984)	10
Lowery v. Zorn, 243 Ala. 285, 9 So. 2d 872 (1942)	9

Manrique v. Fabbri,
493 So. 2d 437 (Fla. 1986) 13,14

Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp.,
696 F.2d 315 (4th Cir. 1982) 11

Mississippi Publishing Corp. v. Murphree,
326 U.S. 438 (1945) 5

Northrop Corp. v. Triad International Marketing S.A., 811 F 2d 1265
(9th Cir. 1987) 11

Parsons v. Chesapeake & Ohio Railway Co.,
375 U.S. 71 (1963) 5

Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984) ... 12

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 5

Pope v. Atlantic Coast Line Railroad Co.,
345 U.S. 379 (1953) 4

Redwing Carriers, Inc. v. Foster,
382 So. 2d 554 (Ala. 1980) 7,8,9

Rice v. Sioux City Cemetery,
349 U.S. 70 (1955) 14

Snyder v. Smith, 736 F.2d 409
(7th Cir. 1984) 11

State ex rel. Marlo v. Hess,
669 S.W.2d 291 (Mo. App. 1984) 11,14

Sun World Lines, Ltd. v. March Shipping Corp.,
801 F.2d 1066 (8th Cir. 1986) 11

Taylor v. Martin, 466 So. 2d 977
(Ala. Civ. App. 1985) 9

The Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) ..... *passim*

The Monrosa v. Carbon Black, Inc.,
359 U.S. 180 (1959) 10

The Stewart Organization, Inc. v. Ricoh Corp.,
810 F.2d 1066 (11th Cir. 1987)
(*en banc*) ..... *passim*

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 7

Van Dusen v. Barrack,
376 U.S. 612 (1964) 4,5

Statutes:

28 U.S.C. § 1331 2

28 U.S.C. § 1332 2

28 U.S.C. § 1337(a) 2

28 U.S.C. § 1391(b) 5

28 U.S.C. § 1404(a) ..... *passim*

N. Y. CIV. PRAC. § 501 10

Other:

Note, "Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?", 48 *Fordham L. Rev.* 568 (1980) 14

Restatement (Second) Conflict of Laws § 80 (1986 Supp.) 14

Wertz, "Forum Selection and Governing Law Provisions in Multi-Jurisdictional Agreements -- Preparation and Implementation," 32 *Rocky Mtn. Min. L. Inst.* 4.1 (1985) 14

31 A. L. R. 4th 404 (1984); 1986 Pocket Part 14

No. 86-1908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ricoh of America, Inc. and its successor-in-interest, Ricoh Corporation (hereinafter, "Respondents" or "Ricoh"), respectfully request this Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit on February 23, 1987.

OPINION BELOW

The Eleventh Circuit's *en banc* opinion is reported in *The Stewart Organization, Inc. v. Ricoh Corp.*, 810

F.2d 1066 (11th Cir. 1987) (*en banc*), and is reproduced in the Petition for Writ of Certiorari, Appendix pp. 1-21.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is 28 U.S.C. § 1404(a), governing transfers of civil actions within the federal court system, which reads as follows:

> 28 U.S.C. § 1404 Change of Venue
>
> ... (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

The Stewart Organization, Inc.'s (hereinafter, "petitioners") statement of the case, Petition at 2-5, is satisfactory, with these additions.

As a result of petitioners' Clayton and Sherman Act antitrust claims, the federal district court in this case had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), as well as diversity of citizenship jurisdiction, 28 U.S.C. § 1332. (The portions of petitioners' complaint invoking the district court's jurisdiction and requesting relief are reproduced at pp. A-1 - A-4 of the Appendix to respondents' brief.).

In the *en banc* opinion below, the Eleventh Circuit held federal law governs the enforceability of choice-of-venue provisions which designate the appropriate venue for actions brought in the federal court system, and that the public policy of Alabama presented no impediment to enforcement, since "[t]here are simply no federalism concerns in deciding which federal court will try a case of federal jurisdiction." *The Stewart Organization*, 810 F.2d at 1070. The concurring judges discerned in 28 U.S.C. § 1404(a) Congress' intent to "increase the efficiency of the federal system," and held "'the interest of justice' requires that the [petitioner] be held to its promise." *Id.* at 1075.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Correctly Applied Erie And Other Applicable Decisions Of This Court.

The Eleventh Circuit held "forum selection clauses present procedural questions to be resolved by federal law independent of forum state policy." *The Stewart Organization*, 810 F.2d at 1067. This holding is consistent with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and other decisions of this Court regarding the respective spheres of federal and state judicial authority.

Petitioners repeatedly characterize the issue presented as involving "contractual provisions ... no more and no less," Petition at 12. However, the provisions at issue deal solely with the *appropriate venue of this litigation within the federal judicial system*, and implicate a controlling federal statute. 28 U.S.C. § 1404(a), directly at issue in this case, involves exclusively federal concerns, and flatly forecloses the

possibility that an *Erie* analysis can be resolved in petitioners' favor. The statute "by its very terms, speaks to federal courts; [and] ...its function is to vest...a federal forum with the power to transfer a transitory cause of action to a more convenient federal court." *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 384 (1953). This Court's decisions reveal 28 U.S.C. § 1404(a) authorizes transfers in the interests of convenience and fairness without regard to what any state's policy on the subject may be.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Court was presented with the mass tort claims of forty aircrash victims who initiated suit in the Eastern District of Pennsylvania. The defendants sought a transfer under 28 U.S.C. § 1404(a), which the plaintiffs opposed. Finding the power of federal district courts to transfer cases under § 1404(a) is one unaffected by state law substantive rules, Justice Goldberg wrote: "[§ 1404(a)'s] remedial purpose - the individualized, case-by-case consideration of convenience and fairness - militates against restricting the number of permissible forums within the federal system." *Id.* at 622-23 (footnote omitted). Petitioners would have this Court turn *Van Dusen* around and hold just the opposite: that the federal district court in this case was bound by state law *not* to consider any other appropriate forum under § 1404(a).

The *Van Dusen* Court was also explicit in holding that the plaintiff cannot choose an inconvenient or unfair forum and then have the federal court ignore § 1404(a) and ratify his choice: "The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by *federal law* and not from the deliberate conduct of a party favoring trial in an inconvenient forum." Id. at 624. (emphasis added).

Van Dusen further makes clear that the only possible *Erie* question in a § 1404(a) context arises when the transferor and transferee forums would apply different bodies of substantive law. In such a situation *Erie's* concerns of forum-shopping and unequal administration of the laws indeed are implicated. *Id.* at 637-38. But those concerns simply cannot arise as regards the transfer itself, for § 1404(a) is nothing more or less than "'a federal housekeeping measure,' allowing easy change of venue within *a unified federal system.*" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (emphasis added).[1]

Even without § 1404(a) and this Court's interpretations of it, whether or not litigants can agree to the venue of a federal lawsuit must be an issue governed by federal law. This Court has never wavered from the position that the venue of a lawsuit is a procedural concern.[2] It is just as apparent that questions of procedure within the federal court system are, and must be, governed by federal law. As this Court observed in *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965):

---

[1]*See Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71 (1963), where the Court held that a federal court's power to transfer a case under § 1404(a) does not depend upon what a similarly situated state court would do. *Id.* at 73-74.

[2]*See Ex parte Collett*, 337 U.S. 55, 71 (1949) (applying § 1404(a), Court held that "[n]o one has a vested right in any given mode of procedure...."); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1945) (that a litigant may be forced to litigate in a certain forum "relates merely to the manner and the means by which a right to recover ... is enforced,"); *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967) (28 U.S.C. § 1391(b), governing venue of cases not premised solely upon diversity of citizenship, is "wholly procedural").

> ... the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts. ... [Moreover] matters which relate to the administration of legal proceedings [are] an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the [Federal] Rules. ... Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.

Rather than contravening *Erie's* dictates, applying federal law to determine where a lawsuit within the federal system will be tried is entirely consistent with *Erie*. As the Court observed in *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), when "a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." And in *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958), the Court noted that "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* at 537. Petitioners' position flies in the face of these principles, and demands that the federal system conform procedurally to state systems.

In sum, that the "fundamental principle" of *Erie* has been violated is a contention best saved for another day and another case, for it has no application here. Petitioners invoked the authority of the federal judicial system -- in part to entertain a claim that the

state courts are powerless to hear.[3] That a state rule must govern the placement of a case within that system runs completely counter to both established precedent and the procedural autonomy of the federal courts.

II. Enforcement Of The Disputed Choice-of-Venue Clause Offends No Applicable State Public Policy.

Petitioners contend that the court below erred in enforcing the choice-of-venue agreement at issue, because the forum state in this case, Alabama, "has a strong public policy against forum-selection clauses," expressed by the Alabama Supreme Court in *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554 (Ala. 1980).[4]

---

[3]Petitioners, while admitting that the complaint in this case contains federal antitrust counts, do not mention that subject matter jurisdiction under the federal antitrust laws is exclusive in the federal courts. *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436 (1920). Plainly, petitioners could not assert that state rules should govern which federal court will adjudicate rights that are wholly federal in creation. Moreover, as petitioners' state and federal claims "derive from a common nucleus of operative fact," *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), the federal district court properly had cognizance of the entire case even without the "accident of diversity."

[4]Respondents in this section (pp. 7-10) take *Redwing Carriers* on its own terms and maintain that its policy is inapplicable to the federal judiciary. On June 11, 1987, however, the Governor of Alabama signed into law an extensive tort reform package, containing *inter alia* several bills (reproduced at pp. A-5 - A-10 of Appendix) regarding venue and transfer of cases in the Alabama courts. H.25 authorizes transfer of cases within the Alabama court system "for the convenience of parties and witnesses, or in the interest of justice . . . ." App. at A-6. H.26 requires Alabama courts to likewise consider whether forum non conveniens principles indicate that a claim originating outside

(footnote 4 continued on next page)

Petition at 12-14. Such reliance on *Redwing Carriers* is plainly misplaced; the Eleventh Circuit's decision contravenes neither the public policy of Alabama nor concerns of federalism.

The expressed policy of Alabama is to hold invalid "contract provisions which attempt to limit *the jurisdiction of the courts of this state*," *Redwing Carriers*, 382 So. 2d at 556 (emphasis added).[5] The case now before this Court has been, from the day of its initiation, within the *federal* court system; Alabama's policy of protecting the *jurisdiction* of its own courts plainly does not apply to the federal courts.[6] As the Eleventh Circuit correctly observed, "[s]ince this case will be tried in federal court, the protection of state court jurisdiction is not involved. There are simply no federalism concerns in deciding which federal court will try a case of federal jurisdiction." *The Stewart Organization*, 810 F.2d at 1066. Petitioners simply

---

Alabama but brought within the state should be dismissed. App. at A-9. The bills at least implicitly reject the concept of "ouster of jurisdiction" underlying *Redwing Carriers*; Alabama's courts are henceforth to "apply forum non conveniens principles in determining whether to accept or decline to take jurisdiction ...." App. at A-9. The presence of this new law fairly calls into question the continuing validity of *Redwing Carriers*, and counsels against enforcement of a putative state policy that either now or in the near future may be viewed as identical to federal policy.

[5]The policy is *not*, as petitioners assert, to guarantee Alabamians "a local forum, so that they cannot be forced to vindicate their rights in distant, expensive forums or lose those rights." Petition at 13. *Redwing Carriers* does not even implicitly rely on such a justification; as observed in the text above, Alabama is solely concerned with the divestiture of its courts' jurisdiction. The *Redwing Carriers* policy, fairly read, is simply not intended to confer substantive rights upon Alabama litigants.

[6]That the district court also had jurisdiction premised upon a federal question emphasizes even more clearly the federal, as opposed to state, interests involved. See n. 3, *supra*, and accompanying text.

cannot escape the fact the public policy embodied in *Redwing Carriers* expressly applies only to Alabama's court system; to assert otherwise is to refashion Alabama law in a way both unstated and unintended.[7]

That Alabama's public policy plainly does not extend to the federal court system indicates yet another reason that the present case is unworthy of the Court's attention. Even assuming *arguendo* that state law should be applied to determine whether a venue agreement is enforceable within the federal court system, the applicable state law would be New York law rather than Alabama law, as the contract between Ricoh and Stewart contains a choice-of-law clause designating New York law as applicable.[8]

---

[7]Petitioners presumptive reading of *Redwing Carriers* is at odds with other Alabama case law. The principle that contracts ostensibly violative of public policy are invalid "should be applied with caution and only in cases plainly within the reason on which the doctrine rests." *Lowery v. Zorn*, 243 Ala. 285, 288, 9 So.2d 872, 874, (1942); *accord Taylor v. Martin*, 466 So. 2d 977, 979 (Ala. Civ. App. 1985); *Goodwin v. George Fischer Foundry Systems, Inc.*, 769 F.2d 708, 713 (11th Cir. 1985) (applying Alabama law). "If it definitely appears that enforcement of a contract will not be followed by injurious results generally, at least what the parties have agreed to ought not to be struck down," *Lowery*, 243 Ala. at 288, 9 So. 2d at 874. In the present case, it is patent that enforcement of a contractual provision by a *federal* court could not possibly result in injury to a *state* court's jurisdiction.

[8]Alabama decisions, including *Redwing Carriers* itself, have held that choice-of-law provisions are enforceable. *Redwing Carriers*, 382 So. 2d at 556; *Craig v. Bemis Co., Inc.*, 517 F.2d 677, 680 (5th Cir. 1977) (applying Alabama law); *Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd.* 599 F.2d 743 (5th Cir. 1979). Indications in *Craig*, 517 F.2d at 677, and other cases that choice-of-law clauses will not be upheld if enforcement would contravene a strong Alabama public policy are inapplicable; as demonstrated at pp. 7-9, Alabama's policy in the present case does not extend to the federal court system.

Under New York law, forum-selection clauses are deemed valid and enforceable by statute. N.Y. CIV. PRAC. § 501 (1976). Section 501 provides that, except where an impartial trial cannot be obtained in the forum fixed by the parties, a "written agreement fixing [the] place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." New York case law likewise supports the validity of agreements like the one here in dispute. *See, e.g., Alwinseal, Inc. v. Travelers Indemnity Co.*, A.D.2d 803, 402 N.Y.S.2d 33 (1978); *Callanan Industries, Inc. v. Sovereign Construction Co., Ltd.*, 44 A.D.2d 292, 354 N.Y.S.2d 486 (1974).

In short, petitioners urge that this Court undertake a serpentine *Erie* analysis that is both unwarranted and unnecessary. Even if federal law is found inapplicable to the issue presented, the state law that will govern both the underlying dispute and the choice-of-venue agreement is New York's. Thus, what petitioners request is little more than a disembodied and irrelevant discursis upon the *Erie* doctrine; the requested review should "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

III. The Conflict Among The Courts Of Appeals Asserted By Petitioners Is More Imagined Than Real.

Petitioners assert that the Eleventh Circuit's *en banc* decision in this case conflicts with decisions of other Courts of Appeals on the same issue. Petition at 10-12. Such, however, is not the case; the great weight of authority in the circuits is consistent with the decision below. *See LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4 (1st Cir. 1984) (choice-of-venue provisions do not oust courts of jurisdiction);

Fireman's Fund American Insurance Cos. v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294 (1st Cir. 1974) (applied standard set out in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)); *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148 (2d Cir. 1984) (*Bremen* followed in suit brought under Securities Exchange Act); *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2d Cir. 1982) (federal law governed enforceability of provision where jurisdiction premised on diversity and antitrust statutes); *Bryant Electric Co., Inc. v. City of Fredricksburg*, 762 F.2d 1192 (4th Cir. 1985) (*Bremen* followed in diversity case); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp.*, 696 F.2d 315 (4th Cir. 1982) (same); *In Re Fireman's Fund Insurance Cos., Inc.*, 588 F.2d 93 (5th Cir. 1979) (*Bremen* standard applied in suit based on diversity and Miller Act); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984) (*Bremen* cited approvingly in upholding arbitration provision); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066 (8th Cir. 1986) (*Bremen* applied in admiralty and diversity case);[9] *Northrop Corp. v. Triad International Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987) (citing *Bremen* approvingly in arbitration context); *Citro Florida, Inc. v. Citrovale,*

[9] *But cf. Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986), a case unmentioned by petitioners. There, the Eighth Circuit wrote that "consideration" should be given to the public policy of Missouri, the forum state. Nevertheless, the statement is plainly dicta: the Eighth Circuit upheld the district court's refusal to enforce the clause as not an abuse of discretion, and nowhere stated that Missouri law determined the clause's enforceability. Moreover, there is strong indication that the court was at least incomplete and perhaps incorrect in interpreting the public policy of Missouri. *See State ex rel. Marlo v. Hess*, 669 S.W.2d 291 (Mo. App. 1984).

S.A., 760 F.2d 1231 (11th Cir. 1985) (choice-of-venue clause analyzed under *Bremen*).

Conversely, the cases upon which petitioners rely establish no conflict. The Ninth Circuit decision cited by petitioners, *Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage*, 735 F.2d 380 (9th Cir. 1984), cannot fairly be said to be the law of that Circuit. In *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the Ninth Circuit, after *Colonial Leasing*, expressly relied upon *The Bremen* and other federal decisions in holding that a choice-of-venue provision was enforceable. *Id.* at 279. In so doing, the court did not even mention the policy of the forum state toward such clauses. Thus, petitioners are clearly incorrect in asserting that the governing law in the Ninth Circuit conflicts with that in the Eleventh on this issue.

The purported conflict with the Third Circuit is tenuous at best. In *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986), from which petitioners quote extensively, the Third Circuit indeed opined that the law of Maryland governed the enforceability of a choice-of-venue provision, but it also stated that such a determination did not mean "that the district court decided the case incorrectly by relying upon *The Bremen*...." *Id.* at 358. In fact, given that the Maryland standard was found to be the same as the federal one, "the district court applied the correct standard," *id.*; the district court's mistake was in applying that standard incorrectly. *Id.* at 359-60. Discussion of the *Erie* issue, then, while perhaps stating the law of the Third Circuit, was clearly not a prerequisite to the court's

action, and amounts to little more than abstract legal theorizing.[10]

Petitioners' argument that the decision below creates an irreconcilable split in the circuits is without merit. The overwhelming weight of authority is consistent with the decision below; any putative conflict engendered by the cases cited by petitioners is clearly not decisive enough to warrant this Court's attention.

IV. Any Need To Decide The Issue Presented Is Obviated By The Overwhelming Trend In State Courts Favoring Enforcement Of Venue-Selection Agreements.

Even if this Court were to rule that state law controls the enforceability of choice-of-venue provisions in federal cases, such a decision would have minimal effect on the federal court system. This Court's decision in *The Bremen*, as the Third Circuit noted, "has strongly influenced the state courts." *General Engineering*, 783 F.2d at 358. *See, e.g., Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986) (citing cases); *Hauenstein & Bermeister, Inc. v. Met-Fab Industries, Inc.*, 320 N.W.2d 886, 889 (Minn. 1982)

---

[10]The Third Circuit did not remand with instructions to decide the issue in accordance with state law; instead it reversed what it deemed to be "a legal conclusion or ultimate fact...." *Id.* at 359.

Moreover, the Third Circuit noted that the contract there at issue contained an enforceable choice of law clause which favored Maryland law (rather than the law of the forum, the Virgin Islands). Thus, if the Third Circuit today decided the present case, it would reach precisely the same result that the Eleventh Circuit did: the choice-of-law clause in the contract in this case designates New York law as governing; under New York law the choice-of-venue clause would be enforceable. *See* pp. 9-10, *supra*.

("the current trend is toward adopting the [*Bremen* test]"); *State ex rel. Marlo v. Hess*, 669 S.W.2d 291, 293 (Mo. App. 1984) ("the modern trend permits enforcement" of choice-of-venue agreements). *See generally* Note, "Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?", 48 *Fordham L. Rev.* 568 (1980).

Indeed, Alabama is one of exceedingly few states that even arguably hold choice-of-venue agreements *per se* invalid as contrary to public policy; the overwhelming majority of jurisdictions now presume such agreements are enforceable.[11]

Thus, even if this Court finds merit in petitioners' position that federal courts must decline to enforce choice-of-venue provisions when enforcement contravenes the public policy of the state wherein they sit, the decision would be of limited import. Indeed, given the paucity of states that *per se* refuse to enforce choice-of-venue agreements, this Court's decision would likely have an impact extending not much further than the litigants in this case. Thus, the Court, "in the absence of compelling reason. . .should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 77 (1955).

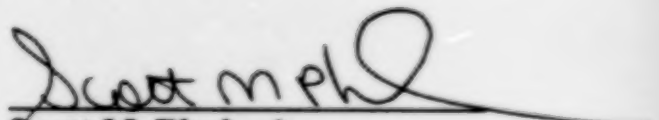
---

[11] *See Manrique, Hauenstein,* and *Hess, supra,* and cases cited therein; *see also* Restatement (Second) Conflict of Laws § 80 (1986 Supp.); 31 A.L.R. 4th 404 (1984) and 1986 Pocket Part. *See generally* Wertz, "Forum Selection and Governing Law Provisions in Multi-Jurisdictional Agreements - Preparation and Implementation," 32 *Rocky Mtn. Min. L. Inst* 4.1 (1986).

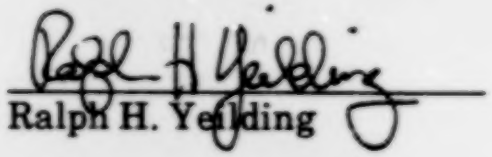
CONCLUSION

For the foregoing reasons, the respondents request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,



Scott M. Phelps*



Ralph H. Yelding

Counsel for Respondents,
Ricoh Corporation and
Ricoh of America, Inc.

OF COUNSEL:

**Counsel of Record*

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STEWART ORGANIZATION, INC., a Corporation; WALTER H. STEWART, an Individual; and JAMES S. SNOW, JR., an Individual,	)	
Plaintiffs,	)	CIVIL ACTION NO. CV84-AR-2460S
v.	)	
RICOH CORPORATION, a Corporation; RICOH OF AMERICA, INC., a Corporation,	)	
Defendants.	)	

COMPLAINT

1. Plaintiff, The Stewart Organization, Inc., ("Stewart Organization"), is a corporation, organized and existing under the laws of the State of Alabama, whose principal place of business is in Alabama.

2. Plaintiff, Walter H. Stewart is an individual, who is a resident citizen of Birmingham, Alabama, and is chief executive officer and a principal shareholder of The Stewart Organization, Inc.

3. Plaintiff, James S. Snow, Jr., is an individual who is a resident citizen of Birmingham, Alabama, and is secretary and a principal shareholder of The Stewart Organization, Inc.

4. Defendant, Ricoh Corporation, is a corporation organized and existing under the laws of a state other than Alabama, whose principal place of business is 5 Dedrick Place, West Caldwell, New Jersey, but which has done business in Birmingham, Alabama, at all times relevant to this Complaint.

5. Defendant, Ricoh of America, Inc., is a corporation organized and existing under the laws of a state other than Alabama, whose principal place of business is 5 Dedrick Place, West Caldwell, New Jersey, but which has done business in Birmingham, Alabama at all times relevant to this Complaint.

6. Plaintiff Stewart Organization is in the business of selling, renting, and leasing office products to its customers. These office products consist of copying machines and related accessories.

7. Defendants Ricoh Corporation and Ricoh of America, Inc. (hereinafter collectively referred to as "Ricoh") are suppliers of copying machines and related accessories.

8. The court has jurisdiction over this cause under 28 U.S.C. § 1332, because there is diversity of citizenship between plaintiffs and defendants and the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. Additionally, jurisdiction of this court is invoked pursuant to the antitrust laws of the United States, specifically Section 1 of the Sherman Act, 15 U.S.C. § 1, and

Sections 3, 4 and 16 of the Clayton Act, 15 U.S.C. §§ 14, 15, and 26, and 28 U.S.C. § 1337.

[Paragraphs nine through fifty-one of the complaint, detailing petitioners' contract, warranty, fraud, and antitrust claims, have been omitted.]

PRAYER FOR RELIEF APPLICABLE TO THIS COMPLAINT, INCLUDING COUNTS ONE THROUGH TEN.

WHEREFORE, PREMISES CONSIDERED, plaintiffs pray as follows:

1. That this court take jurisdiction of the subject matter and parties hereto;

2. That a judgment be entered against defendants, and each of them, in an amount in excess of $100,000.00, according to proof at trial, for compensatory damages arising from defendant's various fraudulent representations, breaches of contract, and breaches of warranty;

3. That a judgment be entered against defendants, and each of them, for an amount in excess of $100,000.00, according to proof at trial, for punitive damages for defendant's various fraudulent representations;

4. That a judgment be entered against defendants, and each of them, on plaintiffs' antitrust claims asserted in Counts 9 and 10, and that compensatory damages in an amount to be determined by the finder of fact be awarded and trebled by the court in accordance with the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

5. To award the Stewart Organization its costs, including reasonable attorneys' fees, in accordance with the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

6. To order such further relief as this court shall deem just.

Respectfully submitted,

/s/
Joseph W. Letzer

/s/
Janet L. Humphreys
Attorneys for Plaintiffs

OF COUNSEL:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 252-3000

Reps. McMillan, Clark (J), Carothers, Higginbotham, Flowers, Johnson (RG), Carter, Biddle, Zoghby, Grouby, Richardson, Laird, Blakeney, Beasley, Hooper, White (L), Layson, Turnham, Harper, Wright, Fuller, Hall, Starkey, Hettinger, Adams, White (F), Beers, Burke, Butler, Willis, Hammett, Seibels, Breedlove, White (G), Curry, McKee, Headley, Gaston, Moon, Bugg, Venable, Harvey, Kvalheim, Lindsey, Knight, Turner, Mikell, Penry, Coburn, Reed, Freeman, Walker, Holley, Haynes, Gray, Ford, Petelos, Logan, Slaughter, Faulk, Newman

H. 25

Enrolled, An Act,

To provide that any court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer a civil action to any other court of general jurisdiction in Alabama in which the civil action might properly have been filed; to provide that any such transferred action shall proceed as though it had been originally filed in the second court; to provide that the right to move for a change or transfer of venue pursuant to this Act is cumulative and in addition to the rights of a defendant under Alabama Code (1975) Section 6-3-20, Section 6-3-21 or Alabama Rules of Civil Procedure; to provide for the repeal of inconsistent laws or parts of laws; to provide for the severability of this Act; to provide that this act shall not apply to any civil action pending on its effective date; and to provide the manner in which this bill becomes law.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Change or Transfer of Venue.

(a) With respect to civil actions filed in an appropriate venue, any court of general jurisdiction shall, for the convenience of parties and witnesses, or in the interest of justice, transfer any civil action or any claim in any civil action to any court of general jurisdiction in which the action might have been properly filed and the case shall proceed as though originally filed therein. Provided, however, this act shall not apply to cases subject to Section 30-3-5 of the Code of Alabama 1975.

(b) The right of a party to move for a change or transfer of venue pursuant to this statute is cumulative and in addition to the rights of a party to move for a change or transfer of venue pursuant to Alabama Code (1975) Section 6-3-20, Section 6-3-21 or Alabama Rules of Civil Procedure rule.

Section 2. All other laws, or parts of laws, which are in any manner inconsistent with this Act are repealed to the extent that they are inconsistent with this Act.

Section 3. If any section, clause, provision, or portion of this Act shall be held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause, or provision of this Act which is not in and of itself invalid or unconstitutional.

Section 4. This Act shall not apply to any civil action pending on the effective date of this Act.

Section 5. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming law.

/s/
Speaker of the House of Representatives

/s/
President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House April 28, 1987, as amended.

John W. Pemberton
Clerk

Senate May 14, 1987 Amended and Passed

House June 4, 1987 As amended by Conference Committee Passed

Senate June 9, 1987 As amended by Conference Committee Passed

---

APPROVED 6/11 1987
TIME 3:20 PM
/s/ Guy Hunt
Governor

McMillan, Clark (J), Carothers, Higginbotham, Flowers, Johnson (RG), Carter, Biddle, Zoghby, Grouby, Richardson, Laird, Blakeney, Beasley, Hooper, White (L), Layson, Turnham, Harper, Wright, Fuller, Hall, Starkey, Hettinger, Adams, White (F), Beers, Burke, Butler, Willis, Hammett, Seibels, Breedlove, White (G), Curry, McKee, Headley, Gaston, Moon, Bugg, Venable, Harvey, Kvalheim, Lindsey, Knight, Turner, Mikell, Penry, Coburn, Reed, Freeman, Walker, Holley, Haynes, Gray, Ford, Petelos, Logan, Slaughter, Faulk, Box, Newman

H. 26

Enrolled, An Act,

To amend Code of Alabama 1975, as amended, § 6-5-430, relating to the enforcement of claims originating outside this state to include claims under the common law and statutes of the United States; to provide for the application of the doctrine forum non conveniens; and to provide for dismissal of any such action where a more appropriate forum exists outside this state; and to provide for the conditioning of such dismissal on certain consents by the defendant.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA

SECTION 1: Amend Code of Alabama 1975, as amended, § 6-5-430, to read, as follows:

"Whenever, either by common law or the statutes of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation, such claim may be enforceable in the courts of this state in any county in which jurisdiction of the defendant can be legally obtained in the same manner

in which jurisdiction could have been obtained if the claim had arisen in this state; provided, however, the courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon such claim originating outside this state; and provided further that, if upon motion of any defendant it is shown that there exists a more appropriate forum outside this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interests of justice, the court must dismiss the action without prejudice. Such dismissal may be conditioned upon the defendant or defendants filing with the court a consent (i) to submit to jurisdiction in the identified forum, or (ii) to waive any defense based upon a statute of limitations if an action on the same cause of action is commenced in the identified forum within 60 days of the dismissal.

SECTION 2. All laws or parts of law which conflict with this Act are hereby repealed.

SECTION 3. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

/s/_____
Speaker of the House of Representatives

/s/_____
President and Presiding Officer of the Senate

House of Representatives
I hereby certify that the within Act originated in and was passed by the House April 28, 1987, as amended.

John W. Pemberton
Clerk

_____

Senate Passed

_____

APPROVED 6/11 1987
TIME 3:20 PM
/s/ Guy Hunt
Governor

REPLY BRIEF

Supreme Court, U.S.
FILED
AUG 17 1987
SPANIOL, JR.
CLERK

No. 86-1908

IN THE

Supreme Court Of The United States

October Term, 1986

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

JOSEPH W. LETZER
F. A. FLOWERS, III*
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners, The Stewart Organization, Inc.; Walter H. Stewart, and James S. Snow, Jr.

*Counsel of Record

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

QUESTION PRESENTED FOR REVIEW

Does state law or federal law govern the enforceability of a forum-selection clause in a contract between two private parties, when the forum state has a strong public policy against the enforcement of such contractual provisions?*

---

*The alternative Question Presented for Review contained in respondents' brief in opposition to the petition was never articulated by either party in the court below. Moreover, respondents never asserted, at any time, or in any form or fashion, the § 1404(a) argument presented to this Court. In fact, respondents never even cited § 1404(a) in the court below in support of their position that federal law, rather than state law, governs the enforceability of a forum-selection clause in a contract between two private parties. Respondents' present § 1404(a) argument is an expansion upon Judge Tjoflat's concurring opinion in the court below, which was rejected by ten out of the thirteen judges hearing this case, and, as far as we can tell, has never been adopted by any federal court, not even the court below. Respondents' attempt to shift the Court's focus away from the straightforward question presented above demonstrates the inherent weakness of their arguments in opposition to the petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
I. Respondents Admitted In The Court Below That There Is Substantial Confusion And Conflict Among The Numerous Federal Cases Addressing The Question Presented For Review Here.	1
II. Respondents' Own Brief In Opposition Demonstrates The Substantial Confusion And Conflict Among The Numerous Federal Cases Addressing The Question Presented For Review Here.	2
III. The Antitrust Aspects Of This Case Do Not Alter The Conclusion That State Law Governs The Enforceability Of The Forum-Selection Clause At Issue.	4
IV. Alabama's Policy Against Forum-Selection Clauses Is Applicable In This Case Under Erie.	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	*Page(s)*
Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (*en banc*)	3
AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148 (2d Cir. 1984)	3
Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982)	3
Blalock v. Perfect Subscription Co., 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979)	8
Bryant Elec. Co., Inc. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985)	3
Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63 (S.D.N.Y. 1975)	8
CAT Aircraft Leasing, Inc. v. Cessna Aircraft Co., 650 F. Supp. 57 (D. V.I. 1986)	4
Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985)	2
Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage, 735 F.2d 380 (9th Cir. 1984)	3
Conticommodity Services, Inc. v. TransAmerica Leasing, Inc., 473 So.2d 1053 (Ala. 1985)	7
Ed Fanning Chevrolet, Inc. v. Serveleasco, Inc., 388 N.E.2d 454 (Ill. 1979)	8
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)	5
Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986)	3
Fireman's Fund American Ins. Companies, Inc. v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294 (1st Cir. 1974)	2
General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986)	3, 4
Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928 (Mo. 1981)	8

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 8

Hanna v. Plumer, 380 U.S. 460 (1965) 6

In re Fireman's Fund Ins. Co., 588 F.2d 93 (5th Cir. 1979) 2

International Traveler's Ass'n v. Branum, 212 S.W. 630 (Tex. 1919) 8

Keystone Leasing v. Peoples Protective Life Ins. Co., 514 F. Supp. 841 (E.D.N.Y. 1981) 8

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 7

Lemon v. Kurtzman, 411 U.S. 192 (1973) 9

LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp., 739 F.2d 4 (1st Cir. 1984) 2

Matthews v. Swift & Co., 465 F.2d 814 (5th Cir. 1972) 8

Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp., 696 F.2d 315 (4th Cir. 1982) 3

Mutual Fire, Marine & Inland Ins. Co. v. Barry, 646 F. Supp. 831 (E.D. Pa. 1986) 4

Nashau River Paper Co. v. Hammermill Paper Co., 111 N.E. 678 (Mass. 1916) 8

Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984) 3

Redwing Carriers, Inc. v. Foster, 382 So.2d 554 (Ala. 1980) 7

Royal Dev. Co., Ltd. v. NLRB, 703 F.2d 363 (9th Cir. 1983) 4

Snyder v. Smith, 736 F.2d 409 (7th Cir. 1984) 3

State ex rel. Polaris Industries, Inc. v. District Court of the 13th Judicial District, 695 P.2d 471 (Mont. 1984) 8

Sun World Lines, Inc. v. March Shipping Corp., 801 F.2d 1066 (8th Cir. 1986) 3

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 5

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 2, 7, 8

The Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987) (*en banc*) 2

United States v. Little Misere Land Co., Inc., 412 U.S. 580 (1973) 5

Statutes:

28 U.S.C. § 1652 6

Other:

Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1 (1976) 7

Magna Charta cc. 17-19 7

Note, *Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?* 48 Fordham L. Rev. 568 (1980) 3, 7

Restatement (Second) of Conflict of Laws § 187 (1971) 8

No. 86-1908

IN THE

Supreme Court Of The United States

October Term, 1986

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EI VENTH CIRCUIT

REPLY BRIEF

ARGUMENT IN REPLY

I. Respondents Admitted In The Court Below That There Is Substantial Confusion And Conflict Among The Numerous Federal Cases Addressing The Question Presented For Review Here.

The question whether state law or federal law governs the enforceability of a forum-selection clause in a contract between two private parties is far from settled, as respondents admitted in the court below. For example, on page 8 of their Petition for Leave to Appeal Pursuant to 28 U.S.C. § 1292(b), filed with the court below on March 4, 1985, respondents stated "it is beyond reasonable dispute that there is a substantial differ-

ence of opinion with regard to the lower court's ruling" – state law, rather than federal law, governed the enforceability of the forum-selection clause contained in the contract entered into between Ricoh and The Stewart Organization. (Petition App. 42-43). Respondents also referred to the issue before the court of appeals and presently before this Court as "under a cloud of doubt." (§ 1292(b) Petition, p. 11).

In their brief in opposition to the petition, however, respondents engage in all sorts of strained legal and logical gymnastics, which simply do not ring true, to convince this Court that the question presented for review does not warrant consideration by the Court. Respondents' prior representations, as well as the contents of their own brief in opposition, totally undermine their position.

II. Respondents' Own Brief In Opposition Demonstrates The Substantial Confusion And Conflict Among The Numerous Federal Cases Addressing The Question Presented For Review Here.

Respondents' brief in opposition demonstrates that the Fifth and Eleventh Circuits view the question presented for review in this case as a "venue" question.[1] The First, Fourth, Seventh and Eighth Circuits, on the other hand, analyze the question as a "contract" question under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), an admiralty case in which a forum-selection clause was enforced because to do so was consistent with "ancient concepts of freedom of contract." 407 U.S. at 11.[2]

[1] *In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979) (venue analysis under the Miller Act); *The Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (*en banc*) (venue analysis, but not the one urged by respondents here). *But see Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231 (11th Cir. 1985) (contract analysis under *The Bremen* in a case involving an international contract between a Florida corporation and a Brazilian corporation).

[2] *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, 739 F.2d 4, 6-7 (1st Cir. 1984) ("an ambigious [forum-selection clause] should be construed against the drafting party, which in this case is LFC"); *Fireman's Fund American Ins. Companies, Inc. v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294 (1st Cir. 1974) (contract analysis under *The Bremen*

Finally, one case from the Second Circuit relied upon by respondents analyzes the issue as primarily one of venue, while another case from the Second Circuit relied upon by respondents analyzes the issue as a contract question.[3] Which view is correct? Only this Court can provide a definitive answer.

In addition to this conceptual confusion and conflict demonstrated by respondents' brief, there is also a square split in the ultimate holdings of the circuits on the question presented for review. In conflict with the decision below, state contract law, rather than federal law, governs the enforceability of forum-selection clauses in the Ninth Circuit, *Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage*, 735 F.2d 380, 382 (9th Cir. 1984), notwithstanding the Ninth Circuit's subsequent decision in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984). This is true because, in the Ninth Circuit, as well as the other circuits, a panel cannot overrule a decision of a prior panel; only the *en banc* court may do so. *See, e.g., Antonio v. Wards Cove*

in a case brought pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*); *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985) (contract analysis; district court applied state contract law, which was the same as *The Bremen* standard); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315 (4th Cir. 1982) (contract analysis under *The Bremen*; state law and federal law were the same); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984) (contract analysis under *The Bremen* where the Federal Arbitration Act controlled); *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986) (public policy of Missouri considered, citing with approval *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 552 (5d Cir. 1986)); *Sun World Lines, Inc. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (contract analysis under *The Bremen* in admiralty case and breach of contract case falling within "the admiralty jurisdiction of the federal courts"). *See generally* Note, *Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?* 48 Fordham L. Rev. 568, 569 (1980) (In *The Bremen*, "the Court analyzed the international forum selection clause before it in accordance with traditional contract principles").

[3] *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2d Cir. 1982) (venue analysis, but not the one urged by respondents here); *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148 (2d Cir. 1984) (contract analysis under *The Bremen* in a case brought pursuant to the Securities Exchange Act).

Packing Co., Inc., 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*); *Royal Dev. Co., Ltd. v. NLRB*, 703 F.2d 363, 368 (9th Cir. 1983).

There is also a conflict between decisions in the Third Circuit and the decision by the court below. As respondents admit on page 12 of their brief, "the law of the Third Circuit" is that state contract law governs the enforceability of forum-selection clauses. *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986). Yet, respondents then argue, inexplicably, that the "law of the Third Circuit" is mere dicta. Regardless of respondents' characterization of the Third Circuit's holding in *General Engineering*, the courts within the Third Circuit consider it binding, which is what is truly important. *See, e.g., CAT Aircraft Leasing, Inc. v. Cessna Aircraft Co.*, 650 F. Supp. 57, 59 (D. V.I. 1986) (relying on *General Engineering*: Kansas law governed enforceability of contractual forum-selection clause); *Mutual Fire, Marine & Inland Ins. Co. v. Barry*, 646 F. Supp. 831, 833 (E.D. Pa. 1986) (under *General Engineering*, "[t]he interpretation of forum-selection clauses, except in certain circumstances not presented here, is governed by state law").

As the foregoing discussion clearly demonstrates, a couple of courts view the enforceability of forum-selection clauses as presenting a question of "venue," while the majority of courts view the enforcement of such clauses as presenting a question of "contract." In addition, some courts have applied federal law, while others have applied state law. Hence, as respondents admitted in the court below, there is substantial confusion and conflict among the courts that have considered the question sought to be reviewed in this case. Consequently, the Court should issue the writ.

III. The Antitrust Aspects Of This Case Do Not Alter The Conclusion That State Law Governs The Enforceability Of The Forum-Selection Clause At Issue.

Respondents fail to understand that the Rules of Decision Act and *Erie* apply in federal question cases, when appropriate, as well as in diversity cases. *United States v. Little Misere Land Co., Inc.*, 412 U.S. 580, 591 (1973). Indeed, "[t]his principle follows from *Erie* itself where . . . we held that the federal courts did not possess the power to develop a concomitant body of general federal law." *Id. See generally Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in *any* case is the law of the state") (emphasis added).[4]

This principle can be illustrated by the Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), an antitrust action falling within the exclusive jurisdiction of the federal courts. In *Texas Industries*, the precise issue was whether a defendant could seek contribution from other participants in an unlawful conspiracy, which the common law did not provide. The Fifth Circuit had held that although neither the Sherman Act nor the Clayton Act affords a right to contribution, the issue should be resolved as a matter of federal common law under the *Clearfield Trust* doctrine. 451 U.S. at 635.

This Court was urged to follow the trend in the law away from the common law rule (which respondents ask the Court to do in this case) by adopting a right to contribution for antitrust violators under federal common law. The Court refused to do so, even though it recognized that the right to contribution might further the purpose of the antitrust laws. The Court held that, because neither the Sherman Act nor the Clayton Act confers upon the federal courts the broad power to formulate a right to contribution in antitrust cases, the issue was a matter for Congress, not the courts, to resolve as a matter of policy: "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common

---

[4]The court below treated this case primarily as a diversity case, as evidenced by its framing of the issue: "This case was taken *en banc* to consider whether a freely negotiated contractual 'choice of forum clause' is enforceable in diversity actions in federal court when the forum state considers such clauses to be violative of state public policy." (App. 2).

law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts." 451 U.S. at 640-41.

The decision by the court below is in direct conflict with this well-settled principle, further evidencing the need for review in this case. This is not an area in which the courts should create federal common law, and Congress has not expressed a policy regarding forum-selection clauses, in the venue statutes or otherwise (agreeing to a particular forum in a contract *before* suit is filed is not the same thing as waiving venue *after* suit is filed). If it were to do so, pursuant to the commerce clause, for example, Congress would have at least three choices: (1) adopt a policy in favor of forum-selection clauses; (2) adopt the common-law policy against forum-selection clauses; or (3) leave the issue to the states. Of course, we do not know how Congress will act, and unless and until it does, state law governs under the Rules of Decision Act because "there can be no other law" to apply. *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965). *See generally* Rules of Decision Act, 28 U.S.C. § 1652.

Along these same lines, even if it is assumed that the enforceability of a forum-selection clause involves a procedural question, which it does not, the issue is still a matter for Congress, or possibly this Court under the Rules Enabling Act, not the courts of appeals. As the Court stated in *Hanna v. Plumer*, *supra*:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it *congressional* power to make rules governing the practice and pleadings in those courts.
>
> • • •
>
> Erie and its offspring cast no doubt on the long-recognized power of *Congress* to prescribe house-keeping rules for federal courts.

380 U.S. at 472 & 473 (emphasis added).

IV. Alabama's Policy Against Forum-Selection Clauses Is Applicable In This Case Under Erie.

The right to have one's disputes resolved locally is as ancient as the Magna Charta cc. 17-19. In Alabama, contractual forum-selection clauses are "invalid and unenforceable as being contrary to public policy." *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554, 556 (Ala. 1980). Alabama's strong public policy against forum-selection clauses, as expressed in *Redwing Carriers, supra*, and expressly reaffirmed, when asked to change its position, by the court in *Conticommodity Services, Inc. v. TransAmerica Leasing, Inc.*, 473 So.2d 1053 (Ala. 1985), is an adoption of the traditional *common-law* rule.

The "*common law* approach . . . was that parties to a *contract* could not 'oust' or prevent a court from taking jurisdiction, and *agreements* purporting to do so were void. . . . The traditional view of the American courts was the *common law* approach; the courts would refuse to give effect to an *agreement* in derogation of the exercise of its jurisdiction." Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1, 8 & 12 (1976) (emphasis added). Furthermore, "[t]he traditional view reflected judicial reluctance to allow individuals to be precluded from their substantial right of access to all competent courts." Note, *Is Ouster Ousted? supra*, p. 1. *See also The Bremen*, 407 U.S. at 11-12. (contract analysis even though "ouster" rationale recognized and criticized).

Whether the rationale of the common law approach is in vogue is irrelevant. The effect of the common law approach and Alabama's policy is that Alabama citizens are guaranteed a local forum in which to resolve their disputes, regardless of a contractual provision to the contrary. Alabama has "the right to pursue local policies diverging from those of its neighbors," whether or not they commend themselves to a federal court, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and the policy of *Erie*, "so important to our federalism must be kept free from entanglements with analytical or termino-

logical niceties" such as "substance," "procedure," and "jurisdiction." *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945).[5]

Finally, contrary to respondents' assertion on page 14 of their brief, a decision in this case will not "be of limited import." In addition to Alabama, five other states have a *per se* rule against the enforcement of contractual forum-selection clauses. *See State ex rel. Polaris Industries, Inc. v. District Court of the 13th Judicial District*, 695 P.2d 471 (Mont. 1985); *Gooseneck Trailer Mfg. Co. v. Barker*, 619 S.W.2d 928 (Mo. 1981); *Ed Fanning Chevrolet, Inc. v. Serveleasco, Inc.*, 388 N.E.2d 454 (Ill. 1979); *International Traveler's Ass'n v. Brannus*, 212 S.W. 630 (Tex. 1919); *Nashau River Paper Co. v. Hammermill Paper Co.*, 111 N.E. 678 (Mass. 1916).

According to the 1987 Statistical Abstract of the United States published by the Bureau of the Census, the most recently

[5]Contrary to respondents' assertion, Alabama law, rather than New York law, which enforces forum-selection clauses, governs the enforceability of the forum-selection clause at issue, notwithstanding the fact that the contract entered into between Ricoh and The Stewart Organization provides that New York law governs. This is true because the court below, as well as the courts of Alabama and New York, will not give effect to a choice-of-law clause when application of the law of the chosen state (New York) would be contrary to a fundamental policy of the state whose law would otherwise apply, here Alabama. *See Matthews v. Swift & Co.*, 465 F.2d 814, 818 (5th Cir. 1972); *Bialock v. Perfect Subscription Co.*, 458 F. Supp. 125, 127 (S.D. Ala. 1978), *aff'd*, 599 F.2d 745 (5th Cir. 1979); *Keystone Leasing v. Peoples Protective Life Ins. Co.*, 514 F. Supp. 841, 847 (E.D. N.Y. 1981); *Business Incentives Co. v. Sony Corp. of America*, 397 F. Supp. 65, 67 (S.D.N.Y. 1975). *See generally* Restatement (Second) of Conflict of Laws § 187(2)(b) (1971). Respondents have not refuted this well-settled principle.

Furthermore, respondents' argument that Alabama's tort reform package "calls into question the validity of *Redwing Carriers*" is based purely on speculation and conjecture. This argument is simply another attempt by respondents to shift the Court's focus away from both the straightforward question presented for review and the necessity of considering the effect of Alabama's firm policy against the enforcement of contractual forum-selection clauses, even if it is assumed that federal law governs, upon the course of litigation in the federal courts. *See The Bremen*, 407 U.S. at 16 (under federal law, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought").

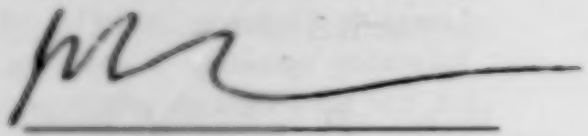
tabulated (1985) populations of Alabama and the other five states having a public policy against the enforcement of contractual forum-selection clauses totals 46,605,000 individuals. Of course, this figure does not include the numerous corporations, partnerships, and individual proprietorships located in these six states, who, like individual citizens, are being subjected more and more to forum-selection clauses, which, quite often, are contained in contracts of adhesion. Hence, to argue, as respondents argue, that a decision in this case "would likely have an impact extending not much further than the litigants in this case" is absurd. (Brief in Opp., p. 14). *See generally Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973) (Burger, C. J.) (plurality opinion) ("statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct").

In summary, this Court, in *Erie* and its progeny, has recognized that the law to be applied in the federal courts raises important questions regarding the proper distribution of power between the state and federal courts. This case raises such a question, and there is substantial confusion and conflict among the numerous federal cases addressing this issue. The writ should be issued in this case because litigants, the federal district courts, and the federal courts of appeals, in the absence of a decision by this Court, will have to waste additional valuable time and resources briefing, debating and deciding the substantial question presented herein.

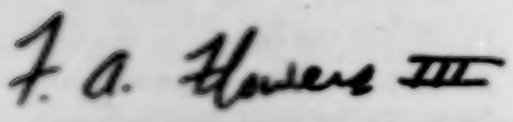
CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the court of appeals, and remand the case with directions to enter a judgment affirming the order of the district court entered herein on January 29, 1985.

Respectfully submitted,



Joseph W. Letzer



F. A. Flowers, III*

Counsel for Petitioners,
The Stewart Organization,
Inc.; Walter H. Stewart, and
James S. Snow, Jr.

**Counsel of Record*

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1908

IN THE

Supreme Court Of The United States

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

JOSEPH W. LETZER
F. A. FLOWERS, III*
BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners
*Counsel of Record

SCOTT M. PHELPS*
RALPH H. YEILDING
BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

Counsel for Respondents
*Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED MAY 22, 1987
WRIT OF CERTIORARI GRANTED OCTOBER 13, 1987

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Plaintiffs' Complaint (filed on September 28, 1984)	4
Defendants' Motion to Dismiss or Transfer for Improper Venue or Forum Non Conveniens (filed on October 23, 1984)	17
Affidavit of Walter H. Stewart (filed on November 27, 1984)	42
Affidavit of John E. Stuart (filed on November 29, 1984)	46
Motion to Strike Affidavit of John E. Stuart (filed on November 29, 1984) and Order Striking Affidavit of John E. Stuart (entered on January 29, 1985)	50
Affidavit of Robert W. Banks (filed on January 29, 1985)	52

The district court's order dated January 29, 1985, denying defendants' motion to dismiss or transfer this action, and the *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit dated February 23, 1987, the decision at issue, as well as the Eleventh Circuit's judgment, are reproduced in the appendix to the petition for a writ of certiorari filed herein on May 22, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-84-AR-2460-S

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Plaintiffs

vs.

RICOH CORPORATION, a corporation, RICOH OF AMERICA, INC., a corporation,
Defendants

WILLIAM M. ACKER, JR., JUDGE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1984	
Sept. 28	Complaint, filed
Oct. 5	Summons and complaint returned executed 10-3-84 on Ricoh Corporation, filed
Oct. 12	Summons and complaint returned executed 10-9-84 on Ricoh of America, Inc., filed
Oct. 23	Motion of defendants to dismiss or transfer for improper venue or forum non conveniens, filed (Del. WMA) SEE ORDER DATED 1-29-85
Nov. 21	Deposition of Walter H. Stewart taken on behalf of the defendants, with exhibits attached, filed

DATE	PROCEEDINGS
1984	
Nov. 27	Affidavit of Walter H. Stewart, filed
Nov. 29	*Affidavit of John E. Stuart, filed *STRICKEN — see order dated 1-29-85
Nov. 29	Motion of plaintiffs to strike affidavit of John E. Stuart, filed (Del. WMA) — 1-29-85 GRANTED (Acker); entered 1-29-85
1985	
Jan. 29	Affidavit of Robert W. Banks with exhibits attached, filed
Jan. 29	ORDER that defendants' motion to dismiss or transfer this action is denied, and defendants are granted 15 days to answer, filed (ACKER); entered 1-29-85
Apr. 4	Certified copy of ORDER of USCA dated 4-2-85 that the petition for permission to appeal pursuant to 28:1292(b) is granted, filed (GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges) — copy to WMA
Apr. 24	Certified record on appeal mailed to Clerk-USCA; copy of transmittal letter and docket sheet showing pagination of the record mailed to attorneys of record
1986	
Jan. 10	Panel decision rendered reversing the district court's order and instructing district court to transfer action to an appropriate court in the

DATE	PROCEEDINGS
1986	
	City of New York and the Borough of Manhattan (GODBOLD, Chief Judge, JOHNSON and TUTTLE, Circuit Judges)
Mar. 17	Certified copy of Order-USCA dated 3-14-86 that this cause shall be reheard by USCA en banc with oral argument on a date to be fixed later; that the previous panel's opinion is vacated; that the Clerk-USCA will specify a briefing schedule for filing en banc briefs, filed (GODBOLD, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, and TUTTLE) -sjr (copy to WMA and Rita D.)
1987	
Mar. 23	Certified copy of judgment on rehearing en banc, dated 2-23-87, issued as mandate 3-19-87, that the judgment of District Court is reversed in this cause and is remanded to be transferred to appropriate Court in New York City and the Borough of Manhattan, in accord with the opinion of USCA; further that plaintiffs pay costs on appeal taxed by the Clerk-USCA, with certified copy of slip opinion and bill of costs (2) attached, filed (RONEY, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, TUTTLE) -rld
Oct. 13	Order Granting Certiorari entered

FILED
SEP 28 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STEWART ORGANIZATION, INC., a Corporation; WALTER H. STEWART, an Individual; and JAMES S. SNOW, JR., an Individual,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. CV 84-AR-2460-S
RICOH CORPORATION, a Corporation; RICOH OF AMERICA, INC., a Corporation,	)	
Defendants.	)	

COMPLAINT

1. Plaintiff, The Stewart Organization, Inc., ("Stewart Organization"), is a corporation, organized and existing under the laws of the State of Alabama, whose principal place of business is in Alabama.

2. Plaintiff, Walter H. Stewart, is an individual, who is a resident citizen of Birmingham, Alabama, and is chief executive officer and a principal shareholder of The Stewart Organization, Inc.

3. Plaintiff, James S. Snow, Jr., is an individual who is a resident citizen of Birmingham, Alabama, and is secretary

and a principal shareholder of The Stewart Organization, Inc.

4. Defendant, Ricoh Corporation, is a corporation organized and existing under the laws of a state other than Alabama, whose principal place of business is 5 Dedrick Place, West Caldwell, New Jersey, but which has done business in Birmingham, Alabama, at all times relevant to this Complaint.

5. Defendant, Ricoh of America, Inc., is a corporation organized and existing under the laws of a state other than Alabama, whose principal place of business is 5 Dedrick Place, West Caldwell, New Jersey, but which has done business in Birmingham, Alabama at all times relevant to this Complaint.

6. Plaintiff Stewart Organization is in the business of selling, renting, and leasing office products to its customers. These office products consist of copying machines and related accessories.

7. Defendants Ricoh Corporation and Ricoh of America, Inc. (hereinafter collectively referred to as "Ricoh") are suppliers of copying machines and related accessories.

8. The court has jurisdiction over this cause under 28 U.S.C. § 1332, because there is diversity of citizenship between plaintiffs and defendants and the matter in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. Additionally, jurisdiction of this court is invoked pursuant to the antitrust laws of the United States, specifically Section 1 of the Sherman Act, 15 U.S.C. § 1, and Sections 3, 4 and 16 of the Clayton Act, 15 U.S.C. §§ 14, 15, and 26, and 28 U.S.C. § 1337.

9. On February 12, 1983, plaintiff Stewart Organization and defendant Ricoh entered into a Copier Products Retail Dealer Sales Agreement ("Sales Agreement"). Pursuant to said Sales Agreement and based on the statements, warran-

ties, representations, promises, and guarantees made by Ricoh and its officers, employees, and agents as more fully discussed in this Complaint, plaintiffs invested substantial time, money, and expense in marketing Ricoh's products in the geographical area defined under said Sales Agreement.

10. The Sales Agreement into which the parties entered provided that "throughout the term of this Agreement [the parties] will act in a fair, equitable and ethical manner to each other . . . ."

11. By the summer of 1983 the Stewart Organization was having numerous problems with and receiving numerous customers' complaints on Ricoh Series 6200 copiers that it had sold to local customers and Series 6200 copiers that were leased by Ricoh to local customers. These problems caused the Stewart Organization to spend a great deal of time and money repairing or replacing the defective 6200 copiers under customer service agreements and its agreement to service Ricoh's leased copiers. Due to the multiplying problems with the 6200 copier, the Stewart Organization was forced in the fall of 1983 to stop handling the Ricoh 6200 Series copier, which left them without a high-speed copier to market.

12. In the fall of 1983, Ricoh Corporation approached Walter Stewart about opening a Ricoh retail dealership in Huntsville, Alabama. At this time, Ricoh Corporation, by and through its agent, Bob Banks, represented to Walter Stewart that it understood that he would need an extended line of credit in order to buy display equipment and inventory for the Huntsville store, and that extending such further credit to Mr. Stewart would be no problem.

13. Pursuant to these representations, the Stewart Organization leased business premises in Huntsville, Alabama, in November, 1983, for the purpose of opening a Ricoh

retail dealership in that area. Further, the Stewart Organization moved an employee from Birmingham to the Huntsville office and hired four additional people to work in the Huntsville office. In January of 1984, Walter Stewart discovered that the representations of Ricoh with regard to his extended line of credit were false, and that Ricoh had no intention of extending him further credit to supply the dealership in Huntsville, Alabama. Immediately thereafter the Stewart Organization closed the Huntsville operation. Nevertheless, due to the fraudulent representations made by Ricoh Corporation, the Stewart Organization incurred substantial costs in leasing the Huntsville business premises, moving one employee to Huntsville, and payrolling the Huntsville employees.

14. In early April of 1984, the Stewart Organization, handicapped by its inability to provide its customers with a high-speed copier because of the unsatisfactory performance and service record of the Ricoh 6200 copier, entered into a dealer sales agreement with Panasonic Corporation, which could supply high-speed copiers to the Stewart Organization. Subsequent to signing the dealer sales agreement with Panasonic, plaintiff Walter Stewart was repeatedly harassed by Ricoh representatives with regard to his decision to handle the competing Panasonic line.

15. In late April of 1984, the Stewart Organization signed another dealer contract with the Ricoh, but was informed that before becoming effective the dealer contract must be approved by William L. Johnson, Southern Zone Manager for Ricoh. William L. Johnson refused to approve the Stewart Organization's new dealer contract, thereby terminating the Stewart Organization as a dealer for Ricoh copiers.

16. Subsequent to the termination of the Stewart Organization as a dealer for Ricoh copiers, the Stewart Organiza-

tion began experiencing numerous problems and complaints from the owners and lessees of Ricoh 4060 copiers. Such problems and complaints have caused the Stewart Organization to spend a great deal of time and money in repairing or replacing the defective machines.

COUNT ONE

17. Defendant Ricoh has breached its express contractual obligation to treat the Stewart Organization in a fair, equitable and ethical manner.

18. As the foreseeable, direct, and proximate result of defendant's breach of contract, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT TWO

19. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 with the same force and effect as if pleaded separately herein.

20. Defendant Ricoh has breached its contractual relationship with plaintiff Stewart Organization to furnish reliable products.

21. As the foreseeable, direct, and proximate result of defendant's breaches of contract, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT THREE

22. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allega-

tions contained in the foregoing paragraphs 1 through 16 with the same force and effect as if fully pleaded separately herein.

23. Defendant Ricoh, in its sale of copiers to plaintiff Stewart Organization, has breached implied warranties of merchantability.

24. As the foreseeable, direct, and proximate result of defendant's breaches of implied warranty of merchantability, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT FOUR

25. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 with the same force and effect as if fully pleaded separately herein.

26. Defendant Ricoh, in its sale of copiers to plaintiff Stewart Organization, has breached implied warranties of fitness for a particular purpose.

27. As the foreseeable, direct, and proximate result of defendant's breaches of implied warranty of fitness for a particular purpose, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT FIVE

28. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 with the same force and effect as if fully pleaded separately herein.

29. Defendant Ricoh's representation, made in the fall of 1985, that if the Stewart Organization opened a new Ricoh dealership in Huntsville it would in turn increase Stewart Organization's line of credit, and the Stewart Organization's agreement to this proposal, formed a oral contract binding upon the parties. The Stewart Organization fully performed its obligations under said binding oral contract, whereupon defendant breached the contract by refusing to increase the Stewart Organization's credit limit.

30. As the foreseeable, direct, and proximate result of defendant's breach of this oral contract, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT SIX

31. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 with the same force and effect as if fully pleaded separately herein.

32. Upon defendant's representation that it would increase plaintiff Stewart Organization's line of credit, the Stewart Organization incurred great costs in organizing a Huntsville business, thus detrimentally relying on defendant's promise to extend plaintiff Stewart Organization's line of credit. This detrimental reliance created an enforceable obligation on the part of Ricoh to extend plaintiff Stewart Organization's line of credit as represented, which obligation was breached by defendant Ricoh.

33. As the foreseeable, direct, and proximate result of defendant's failure to perform this obligation, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT SEVEN

34. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 with the same force and effect as if pleaded separately herein.

35. Defendant Ricoh's representation that it would increase plaintiff Stewart Organization's line of credit if plaintiff opened a Huntsville business location was false. This misrepresentation was made willfully to deceive, or recklessly without knowledge, and acted on by plaintiff Stewart Organization, so as to constitute fraud under Alabama Code Section 6-5-101 (1975).

36. As the foreseeable, direct, and proximate result of defendant's false and fraudulent misrepresentations, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT EIGHT

37. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 with the same force and effect as if pleaded separately herein.

38. The foregoing misrepresentation was a willful or fraudulent or reckless misrepresentation made to induce plaintiffs to act and upon which plaintiffs did act to their injury, so as to constitute deceit and fraudulent deceit under Alabama Code Sections 6-5-103 and 6-5-104 (1975).

39. As the foreseeable, direct, and proximate result of deceit and fraudulent deceit, plaintiff Stewart Organization has been damaged in an amount in excess of $100,000.00, according to proof at trial.

COUNT NINE

40. By entering into a dealership agreement with Panasonic, Inc., the Stewart Organization intended to acquire a line of high-speed copiers, which it needed as a result of its forced discontinuation of the Ricoh 6200 copier line. Shortly after entering into the dealership agreement with Panasonic, plaintiff Stewart Organization began to be harassed regarding this action by Ricoh representatives and then was informed that there was a question as to whether its Sales Agreement with Ricoh would be renewed. Renewal of plaintiff Stewart Organization's Sales Agreement was ultimately withheld by Ricoh.

41. At the time of Ricoh's decision to refuse renewal of plaintiff Stewart Organization's Sales Agreement, plaintiff was performing its obligations under the Sales Agreement fully, and specifically had been identified by defendant Ricoh on February 13, 1984, as one of the top twenty dealers in the United States relating to sales production.

42. Section 1 of the Sherman Act makes every contract, combination or conspiracy in restraint of trade in interstate commerce illegal.

43. The Stewart Organization and Ricoh are engaged in interstate commerce as the Stewart Organization purchases a substantial quantity of equipment, parts, and supplies for use in its business from Ricoh Corporation, which sells its products throughout the United States.

44. On information and belief, defendant Ricoh has an implicit requirement that its dealers not market competing products and has instituted a policy whereby it terminates any of its dealers who agree to sell copiers of companies in competition with defendant Ricoh. Further, on information and belief, defendant Ricoh has instituted a policy of utilizing veiled threats of non-renewal of dealership agreements in order to force dealers into a tacit understanding not to handle a competitor's products. On information and belief, many Ricoh dealers have therefore tacitly agreed with Ricoh not to carry the copiers of other suppliers.

45. Defendant Ricoh's conspiracy to force its dealers to acquiesce in contracts of exclusive dealing has had the effect of substantially restraining interstate commerce in the sale and distribution of copiers by establishing an unlawful entry barrier to its market for competing goods, which constitutes a vertical restriction in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. As the foreseeable, direct, and proximate result of defendant's illegal actions, plaintiff Stewart Organization has been damaged in an amount in excess of $300,000.00, according to proof at trial.

COUNT TEN

46. Plaintiffs reallege and hereby incorporate by reference, each and every, all and singular, the facts and allegations contained in the foregoing paragraphs 1 through 16 and 40 through 44 with the same force and effect as if pleaded separately herein.

47. Section 3 of the Clayton Act makes unlawful every contract for the purchase and sale of goods on the condition or understanding that the purchaser will not deal in the goods of a competitor where the effect of such a condition or understanding may be to substantially lessen competition.

48. Ricoh's Copier Products Retail Dealer Sales Agreements constitute contracts for the sale of goods in interstate commerce within the meaning of Section 3 of the Clayton Act, 15 U.S.C. § 14.

49. Defendant Ricoh's sales to plaintiff Stewart Organization were made on the implicit condition that the Stewart

Organization would not sell copiers manufactured by competing companies. When the Stewart Organization discovered that defendant Ricoh was attempting to force it into an unlawful exclusive dealing arrangement, it refused to participate in such unlawful activity and was then terminated.

30. The effect of Ricoh's unlawful agreements that its dealers not sell copiers of other manufacturers and its policy of terminating dealers who sold other lines of copiers has been to substantially lessen competition in the copier market in Alabama and in other areas serviced by dealers who have implicitly agreed not to sell the products of other copier manufacturers.

31. Ricoh's unlawful conduct constitutes a vertical restriction in violation of Section 3 of the Clayton Act and entitles Stewart Organization to treble damages and its attorney's fees and costs under Section 4, 15 U.S.C. Section 15. As the forseeable, direct, and proximate result of defendant's unlawful actions, plaintiff Stewart Organization has been damaged in an amount in excess of $300,000.00, according to proof at trial.

PRAYER FOR RELIEF APPLICABLE TO THIS COMPLAINT, INCLUDING COUNTS ONE THROUGH TEN.

WHEREFORE, PREMISES CONSIDERED, plaintiffs pray as follows:

1. That this court take jurisdiction of the subject matter and parties hereto;

2. That a judgment be entered against defendants, and each of them, in an amount in excess of $100,000.00, according to proof at trial, for compensatory damages arising from defendant's various fraudulent representations, breaches of contract, and breaches of warranty;

3. That a judgment be entered against defendants, and each of them, for an amount in excess of $100,000.00, according to proof at trial, for punitive damages for defendant's various fraudulent representations;

4. That a judgment be entered against defendants, and each of them, on plaintiffs' antitrust claims asserted in Counts 9 and 10, and that compensatory damages in an amount to be determined by the finder of fact be awarded and trebled by the court in accordance with the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

5. To award the Stewart Organization its costs, including reasonable attorneys' fees, in accordance with the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15;

6. To order such further relief as this court shall deem just.

Respectfully submitted,

/s/ JOSEPH W. LETZER
Joseph W. Letzer

/s/ JANET L. HUMPHREYS
Janet L. Humphreys

Attorneys for Plaintiffs

OF COUNSEL:

THOMAS, TALIAFERRO, FORMAN,
BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

VERIFICATION OF COMPLAINT

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

Before me, the undersigned Notary Public in and for said County in said State, personally appeared Walter H. Stewart, who, having been duly sworn, deposes and says that he is the Chief Executive Officer of The Stewart Organization, Inc., and is by it duly authorized to make this affidavit on its behalf; that he is familiar with the contents of the above complaint and has read it; that the facts stated therein, where stated as facts, are true, and where stated on information and belief, he is informed of such facts by credible sources and verily believes them to be true.

/s/ WALTER H. STEWART
Walter H. Stewart

Sworn to and subscribed before me
this 27th day of September, 1984.

/s/ BARBARA GRILL
Notary Public
My Commission Expires: 3/18/88

FILED
OCT 23 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

THE STEWART ORGANIZATION, INC., a Corporation; WALTER H. STEWART, an Individual; and JAMES S. SNOW, JR., an Individual,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. CV 84-AR-2460-S
RICOH CORPORATION, a Corporation; RICOH OF AMERICA, INC., a Corporation,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE OR FORUM NON CONVENIENS

Pursuant to 28 U.S.C. 1406(a) and 28 U.S.C. 1404(a), defendants Ricoh Corporation, a corporation, and Ricoh of America, Inc., a corporation, move to dismiss or transfer plaintiffs' Complaint on the following grounds:

1. Venue for this action properly lies with the courts in the Borough of Manhattan, New York City, New York. All of the allegations in the Complaint arise under or are connected with a dealership agreement entered into by the

plaintiffs and defendant Ricoh of America, Inc. (See attached Exhibit A). This agreement provides in pertinent part:

> 18. *General Provisions*
>
> 18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

By entering this dealership agreement, plaintiffs agreed that all disputes arising out of or connected with its contractual relationship with defendant Ricoh would be heard by the courts in the Borough of Manhattan, New York City, New York. Therefore, venue in this court is improper.

2. Plaintiffs also agreed in Clause 18 of their dealership agreement with Ricoh that all disputes would be governed by and interpreted in accordance with New York law. Therefore, since the courts located in New York interpret New York law on a daily basis, a New York court would be best able to fulfill the intent of plaintiffs' dealership contract with defendant.

Defendants respectfully request oral argument before the Court on this Motion and respectfully inform the Court of their intent to brief the issues raised by this Motion.

Respectfully submitted,

/s/ SCOTT M. PHELPS

/s/ RALPH H. YEILDING

Attorneys for the Defendants

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served upon all attorneys of record, by placing a copy of same in the United States Mail, postage prepaid and properly addressed, on this the 16th day of October, 1984.

/s/ RALPH H. YEILDING

OF COUNSEL

EXHIBIT A

RICOH OF AMERICA, INC.

COPIER PRODUCTS RETAIL DEALER SALES AGREEMENT

AGREEMENT, made as of this 11th day of October, 1983, between RICOH OF AMERICA, INC. ("Ricoh"), a New York corporation with offices located at 20 Gloria Lane, Fairfield, New Jersey 07006 and The Stewart Organization, Inc. ("Dealer"), a corporation, with offices located at 1210 South 20th St., Birmingham, AL. 35205. This Agreement shall expire on March 31, 1984, unless sooner terminated pursuant to Section 17 of this Agreement.

Statement of Understanding

Ricoh has undertaken the manufacture and development of a line of dry office copiers and desires to market certain of these products under the Ricoh brand name through an effective network of retailers. Ricoh recognizes the need for its technical and parts support to its retailers and wishes to provide its retailers with incentives and with a full range of services in order to encourage its retailers to effectively and aggressively to promote, market and service such products so as to achieve widespread user satisfaction with such products.

Dealer wishes to become an authorized retailer for certain Ricoh products and to carry out the aggressive and effective promotion, marketing and servicing of such products in the area described in Schedule A.

Accordingly, Ricoh and Dealer, in consideration of their mutual undertakings in this Agreement, agree as follows:

1. *Conduct of the Parties*

1.1 Ricoh and Dealer agree that throughout the term

of this Agreement they will act in a fair, equitable and ethical manner to each other and to the end-user.

2. *Definitions*

2.1 The terms "acquire", "acquiring", "obtain" or "obtaining" (or any other derivative of acquire or obtain) means the purchase, lease or rental of Products.

2.2 The term "area" means an area assigned by Ricoh to a Retailer for marketing Products.

2.3 The term "Dealer's Territory" means the area designated in Schedule A as the area assigned to Dealer.

2.4 The term "end-user" means a customer who is acquiring Products for such customer's own needs and not for sale.

2.5 The term "Government Account" means (a) an account of (i) the Government of the United States of America, its agencies, departments or branches, or (ii) any state or local (city or county) government, governmental agency, political subdivision, or branch, or (b) any person or entity entitled to obtain Products under or pursuant to any contract with any such account described in Section 2.5 (a).

2.6 The term "Major Account" means (a) a customer which obtains, which expresses an interest in obtaining, or which might be interested in obtaining two or more Ricoh dry office copiers to be installed in each of two or more locations, or (b) a customer which obtains, which expresses an interest in obtaining, or which might be interested in obtaining more than 10 Ricoh dry office copiers to be installed in Dealer's Territory.

2.7 The term "market" means sell, rent, lease, promote and provide installation and warranty service.

2.8 The term "Products" or "Product" means any and all of the following dry office copiers marketed under the

Ricoh brand name: Model Numbers FT 3020, FT 3050, FT 4030, FT 4060, FT 6200, FD 6600 (and any other model numbers as from time to time may be added by Ricoh in its discretion in written Addenda to this Agreement) and any Ricoh accessories, supplies and replacement parts for such dry office copiers as may from time to time be made available by Ricoh.

2.9 The term "Retailer" means any individual or other entity authorized by Ricoh to sell Products in a designated area.

2.10 The term "sell", "selling", "sale", "sold" or "sells" (or other derivatives of sale or sell) means the sale, lease or rental of Products.

2.11 The term "Service Representative" means an individual who has successfully completed the course given at a Ricoh Technical Training Center.

2.12 The term "Warranty Service" means repair or replacement of Products during the period and under terms described in Section 9.2.

3. *Dealer's Appointment*

3.1 Ricoh appoints Dealer as a Retailer of the Products. Dealer's primary responsibility shall be to market Products in Dealer's Territory. SUCH APPOINTMENT IS NOT EXCLUSIVE, AND RICOH MAY IN ITS SOLE DISCRETION WITHOUT CAUSE APPOINT OTHER RETAILERS AS DEALERS WHO SHALL BE LOCATED IN AND WHOSE PRIMARY RESPONSIBILITY SHALL BE TO MARKET PRODUCTS IN DEALER'S TERRITORY. Such additional appointment or appointments shall not itself operate as a termination of the Agreement.

3.2 In consideration of its appointment as Dealer:

(a) Dealer agrees, when requested by Ricoh, to offer installation and Warranty Service with respect to all Products installed in Dealer's Territory (whether or not such Products were sold by Dealer), except that Dealer shall not be required to offer installation or Warranty Service with respect to any Product sold by another Retailer for installation in the area assigned to such other Retailer where such Retailer is capable of rendering such installation and Warranty Service; and

(b) Dealer agrees, when requested by Ricoh, to offer to each Major Account or Government Account which has acquired Products for installation in Dealer's Territory installation, Warranty Service, and such additional service as Ricoh shall have negotiated with such Major Account or Government Account.

3.3 Dealer shall maintain a place of business at which Dealer displays Products and promotional material made available by Ricoh only in the location or locations designated in Schedule B. If Dealer opens a branch at a location other than that designated in Schedule B, Dealer may display Products and such promotional material at such branch only upon written approval by Ricoh.

4. *Pass-over Program*

4.1 When Dealer sells Products which are to be installed in any area other than Dealer's Territory, it shall be Dealer's responsibility to pay to the Retailer in whose area the Products are to be installed (or if there is more than one Retailer in such area, to any such Retailer at Dealer's option) a uniform reasonable fee (as specified in writing in advance by Ricoh) to compensate such Retailer for its warranty and installation obligations and overhead expenses in relation to the Products. Such uniform reasonable fee shall be subject to change upon 30 days notice from Ricoh to all

Retailers (including Dealer) and shall be payable by Dealer without regard to whether installation and Warranty Service are actually extended. If at any time Ricoh or any Retailer discovers that any such uniform reasonable fee payable by Dealer to such Retailer pursuant to the terms of this Section 4.1 has not yet been paid to such Retailer, (a) Ricoh or such Retailer (as the case may be) may notify Dealer, (b) within 10 days of receipt of such notice Dealer shall pay to such Retailer all portions of such uniform reasonable fee and (c) if within such time Dealer shall fail so to pay such uniform reasonable fee, Ricoh shall invoice Dealer for such uniform reasonable fee and Dealer shall remit such uniform reasonable fee to Ricoh.

4.2 Ricoh shall use its best efforts to insert in contracts with other Retailers provisions similar to this Section 3.

4.3 The uniform reasonable fee, if any, which is paid to Ricoh pursuant to Section 4.1 or 4.2 will be paid by Ricoh to the Retailer in whose area the Products are installed (or if there is more than one Retailer in such area, to any such Retailer at Ricoh's option). Such payment will be made by Ricoh upon receipt by Ricoh of the payment from the selling Retailer, and will become a liability of Ricoh to the Retailer in whose area Products are installed only upon receipt by Ricoh of payment of the uniform reasonable fee from the selling Retailer.

5. *Government and Major Account Program*

5.1 It is understood and mutually agreed that in order to maximize distribution of the Products, it is necessary for Ricoh and Dealer to comply with the Ricoh Major Account Manual, as amended from time to time, and that by signing this Agreement, Ricoh and Dealer agree to so comply.

5.2 Under the Major and Government Account Program:

(a) Ricoh retains the right to solicit orders for Products from all customers that it determines might be Major Accounts or Government Accounts.

(b) Dealer, when it determines that a customer might be a Major Account or a Government Account, may continue to pursue a sale with such Major Account or Government Account and/or may advise Ricoh of the identity of the Major Account or Government Account, all as provided in the Ricoh Major Account Manual as amended from time to time.

(c) If Ricoh negotiates a contract or concludes a sale to a Major Account or Government Account, Dealer shall participate in such contract or sale, as described in and in compliance with the Ricoh Major Account Manual, as amended from time to time, and with the terms, provisions and conditions of such contract or sale. Ricoh may direct Dealer to, and Dealer shall, install and service Products in such accounts (if such installation or service is to be performed (i) in Dealer's Territory or (ii) (x) within a 60 mile radius of an office location of Dealer, (y) not located in an area assigned to any other Retailer and (z) closer to an office location of Dealer than to an office location of any other Retailer), in which case Ricoh shall pay to Dealer such installation and service fees as Ricoh shall from time to time establish in writing, which fees shall, at a minimum, in Ricoh's good faith judgment cover Dealer's anticipated installation and servicing costs.

(d) Subject to the terms of the Ricoh Major Account Manual as amended from time to time, if Ricoh concludes a sale to a Major Account or Government Account and if Dealer was, in Ricoh's judgment, instrumental to Ricoh's

conclusion of such sale, Ricoh shall award Dealer sales commissions (in such amounts as Ricoh shall from time to time establish in writing with respect to such sale).

(e) Dealer acknowledges that it is without authority to, and shall not, modify or change any term or condition of any contract or sale described in Section 5.2 (c). Dealer agrees to indemnify Ricoh for all lost profits, costs, expenses or damages incurred or paid by Ricoh arising from Dealer's non-compliance with this Section 5 or any provision of the Ricoh Major Account Manual, as amended from time to time (including, without limitations, lost profits, costs, expenses or damages arising from price reductions and price rebates which Ricoh is required to grant due to Dealer's non-compliance with such sections).

(f) Changes in fees and commission established pursuant to Section 5.2 (c) and 5.2 (d) shall be effective 30 days after the date of any notice of such changes.

(g) Ricoh agrees to refer to Dealer or some other Retailer (which may be wholly or partially owned by Ricoh) whose primary responsibility is the marketing of Products in Dealer's Territory all customers which Ricoh solicits and which Ricoh determines are not Major Accounts or Government Accounts, but which express an interest in purchasing Products for installation in Dealer's Territory.

6. *Promotion and Marketing*

6.1 Dealer shall at all times (a) devote its best efforts to market the Products, (b) display demonstration Products in good working order in its place of business, (c) utilize Ricoh advertising and promotional materials made available by Ricoh to Dealer and (d) maintain commercial telephone listings indicating that Dealer has Products for sale.

6.2 Ricoh shall contribute to advertising by Dealer in an amount to be determined by Ricoh. It is understood

that in order for Dealer to qualify for this contribution, the format of the advertising must be approved by Ricoh.

6.3 Ricoh may require the participation of sales employees of Dealer in Ricoh sales training programs.

6.4 Dealer agrees to conform its sales procedures to the procedures established in the Ricoh Field Manual, as distributed and amended from time to time by Ricoh.

7. *Sales Requirements*

7.1 Dealer shall purchase from Ricoh for sale and installation at locations of end-users in Dealer's Territory, during the indicated periods, those minimum quantities, set forth in Schedule C, of the indicated models of Products purchased from Ricoh by Dealer; *provided, however,* if Dealer shall fail to purchase such quantities but Dealer has purchased in such period at least 30% of such minimum quantities for all of the indicated models of Products, then Dealer shall be entitled, for the purpose of determining its compliance with the minimum quantities set forth in Schedule C for such indicated period, to convert purchased units of other models into units of any underpurchased model, pursuant to the Conversion Chart set forth in Schedule C; *provided further, however,* that conversion will be permitted only when in such indicated period the specified minimum quantity set forth in Schedule C for the model to be converted has been complied with, and only to the extent that after such conversion, the number of units purchased of the model to be converted (not including those units so converted) is equal to or exceeds the specified minimum quantity for such model.

7.2 In addition to complying with the minimum quantities set forth in Schedule C as required by Section 7.1, Dealer shall purchase, during the first three months of any indicated period, at least 30% of such minimum quan-

tities for such indicated period for all of the indicated models of Products.

7.3 Dealer shall submit installation reports (the form of which is attached hereto as Exhibit A) to Ricoh. Such reports must be submitted monthly and must be received by Ricoh (at its office at 20 Gloria Lane, Fairfield, New Jersey) no later than the seventh day of the month following the month for which such report is made. Either the failure to submit such reports in a timely manner or the submission of false reports shall constitute a material breach of this Agreement.

8. *Terms of Sale; Financing*

8.1 Ricoh shall sell and Dealer shall buy the Products at Ricoh's Dealer prices in effect on the date of shipment. Each sale by Ricoh and purchase by Dealer shall be governed by the terms and conditions of sale in effect at the time of sale as appearing on the invoices or other printed material issued by Ricoh. Ricoh may alter its Dealer prices or its terms and conditions of sales or may discontinue the sale of any Product at any time without prior notice, but shall endeavor to give Dealer 30 days notice prior to any such change becoming effective. Dealer shall be responsible for and shall pay any present or future sales, use, excise or other similar tax applicable to the sale, use, transportation or addition to value of the Products. Unless otherwise expressly set forth in writing on any invoice or shipping document, all prices are F.O.B. the Ricoh distribution facility for Products nearest to Dealer's Territory. Dealer shall bear all costs, insurance premiums, freight and all other charges and expenses incurred after Ricoh has placed the Products in the custody of a carrier at such Ricoh distribution facility.

8.2 Dealer has the option of (a) enclosing a check or

sight draft with an order for Products, in the full amount of the order less a cash discount in such amount as may be specified in writing from time to time by Ricoh, or (b) purchasing Products on credit, to the extent of Dealer's credit line as established in writing from time to time by Ricoh, in which latter case Ricoh may require Dealer to grant to Ricoh a security interest as more fully set forth in a separate Security Agreement between Ricoh and Dealer.

8.3 In the event Dealer does not pay to Ricoh any amounts owing to Ricoh pursuant to this Agreement within the time specified by Ricoh, or if Ricoh has good cause to believe Dealer's creditworthiness is diminished, or if Ricoh deems itself insecure, (a) Ricoh may reduce, modify or eliminate Dealer's credit line with Ricoh, (b) Ricoh may decline to accept further orders from Dealer or decline to make further deliveries to Dealer or (c) Ricoh may elect to make further deliveries only on a cash-with-order basis or to require Dealer to provide adequate assurance of Dealer's creditworthiness prior to making any further deliveries to or for the account of Dealer.

8.4 For purposes of this Section 8 only, the terms "sale", "sell" or "sold" (or any derivative of sale or sell) shall not include the lease or rental of Products.

9. *Warranty; Limitation of Warranty*

9.1 Ricoh warrants exclusively to Dealer that all parts originally incorporated in each copier or accessory sold to Dealer by Ricoh shall, at time of placement of such Product by Ricoh with a carrier for shipment to Dealer be free from defects in material and workmanship until the earlier of (a) 150 days after placement by Ricoh of such Product with a carrier for shipment, and (b) 90 days after installation of such Product at the location of the end-user, *provided, however,* that in the case of consumable parts as identified by

Ricoh from time to time in writing (including without limitation, scheduled maintenance parts, as that term is used in the Ricoh Dealer Operations Manual, and supplies) Ricoh warrants exclusively to Dealer that it will repair any such part which is discovered to be defective before *there has been produced, by the Product* into which the consumable parts are incorporated, the number of copies specified from time to time in writing by Ricoh for purposes of warranty; *provided further, however,* that all warranties described in this Section 9.1 shall be ineffective in this case of (i) any Product that has been subjected to misuse, mishandling, misapplication, neglect, accident, improper repair, damage by circumstances beyond Ricoh's reasonable control or modification by Dealer (whether or not authorized by Ricoh) (including but not limited to used, unauthorized parts), (ii) insignificant defects such as scratches which are not prominent, minor mechanical or electrical maladjustment, or random manufacturing errors which can be easily corrected or (iii) replacement parts or supplies not originally incorporated in any Ricoh dry office copier. The remedy under all warranties is limited solely to the repair or replacement of the malfunctioning parts. All warranties shall be effective only if (x) an installation report is submitted pursuant to and within the time required by Section 7.3 and (y) a warranty claim form is submitted pursuant to and within the time required by Section 9.3. THE WARRANTIES SET FORTH ABOVE ARE EXCLUSIVE AND IN LIEU OF, AND RICOH EXPRESSLY DISCLAIMS, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. RICOH SHALL NOT HAVE ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL

DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE PRODUCTS.

9.2 Dealer shall extend to the purchaser, renter or lessee of each Product installed in Dealer's Territory (whether or not sold by Dealer) a warranty with terms at least as favorable as Ricoh's warranty to Dealer set forth in Section 9.1, except that (a) Dealer shall not be required to offer a warranty period measured by the date of shipment by Ricoh and (b) Dealer shall not be required to extend a warranty to Products sold by another Retailer for installation in the area assigned to such other Retailer where such Retailer is capable of rendering such warranty.

9.3 In the event Products or parts thereof require repair or replacement during the warranty period described in Section 9.1, Dealer is required to provide such repair or replacement services. Ricoh shall in consultation with Dealer determine whether the Products or parts thereof shall be repaired or replaced. In the event that Ricoh determines that replacement is necessary, Ricoh shall reimburse Dealer for the costs of replacement or Ricoh shall itself provide replacements. In no event shall Ricoh be responsible for any labor costs incurred in provision of Warranty Service. Within 60 days of extending Warranty Service, Dealer shall submit to Ricoh a warranty claim on a form provided by Ricoh.

9.4 In no event shall Ricoh have any responsibility for any damage caused to the Products during shipment to Dealer. It shall be the sole responsibility of Dealer to file appropriate claims for reimbursement with the carrier.

10. *Force Majeure*

10.1 Ricoh shall use its best efforts to make prompt and timely shipments of orders submitted by Dealer, but

shall not be liable for failure to provide products or for delay in shipment of Products where such failure or delay is the result of strikes, lockouts, accidents, fire, delays in manufacture, transportation or delivery of materials, acts of God, embargoes, governmental or judicial actions or any other causes beyond Ricoh's reasonable control.

10.2 Dealer shall have a reasonable time to cure any default under this Agreement which default was caused solely by Ricoh's failure to provide to Dealer in a timely fashion Products ordered by Dealer.

11. *Service Representatives*

11.1 In order to promote prompt and efficient service of Products, Dealer shall have in his employment, for each location designated in Schedule B:

(a) Within 90 days of execution of this Agreement, at least two Service Representatives whose principal place of employment shall be not more than 30 miles from such location, so that the minimum number of Service Representatives of Dealer shall be the product of multiplying two by the number of locations specified in Schedule B;

(b) After the 90th day following the date of the execution of this Agreement, the number required by Section 11.1 (a), plus a sufficient number of Service Representatives such that the ratio of the number of any particular model of Ricoh copier purchased by Dealer to the number of Service Representatives trained to service that model does not exceed 100/1 (one hundred to one), so that at all times that this Agreement is in effect, the ratio of the total number of Ricoh copiers purchased by Dealer to the total number of Service Representatives does not exceed 100/1 (one hundred to one).

11.2 Ricoh agrees to train these representatives at a Ricoh Technical Training Center, and to provide lodging

for the representatives while they attend a Ricoh Technical Training Center. Dealer agrees to pay its representatives' travel expenses to, and salary while attending, such a Center.

11.3 Dealer agrees that when it repairs, installs or otherwise services Products, it shall permit only Service Representatives to provide such services.

11.4 Dealer agrees that, as a pre-condition of admission of an individual to a Ricoh Technical Training Center, (a) Dealer must certify, on a form provided by Ricoh, that the individual is a Dealer employee and (b) the individual must successfully pass an entrance examination given by Ricoh.

11.5 Ricoh may, at its discretion, decline to deliver any particular Product to any location of any Retailer until there is one employee of such Retailer in the location to which such Product is to be delivered who is a Service Representative trained to service such Product.

12. *Replacement Part Requirements and Recommendations*

12.1 It is understood and mutually agreed that, in consideration of Dealer's appointment pursuant to this Agreement and in order to ensure that Dealer has sufficient parts to service Products effectively, Dealer will purchase a basic stock kit consisting of the items, and in the quantities, specified in writing by Ricoh (the "Basic Stock Kit").

12.2 Dealer shall have the Basic Stock Kit in his possession before commencing sales of the Products, but may not purchase the Basic Stock Kit until he employs at least one Service Representative.

12.3 It is recommended that Dealer also at all times after commencing sales of the Products have in his posses-

sion additional replacement parts, meeting the specifications and in the quantities listed in writing by Ricoh.

12.4 When repairing, installing or otherwise servicing the Products, Dealer shall use only replacement parts meeting the specifications listed from time to time in writing by Ricoh.

13. *Records and Reports*

13.1 It is understood and mutually agreed that in order for Ricoh to determine Dealer's creditworthiness for the purposes of Section 8, it is necessary for Dealer to submit timely and accurate reports to Ricoh. Therefore, Dealer agrees to furnish financial statements (audited, if available) to Ricoh from time to time upon request by Ricoh, such statements to include Dealer's then-current balance sheet, income statement, sales figures and any other financial information which Ricoh may reasonably request.

13.2 Ricoh shall treat reports submitted pursuant to Section 13.1 as confidential, and shall endeavor to prevent anyone other than Ricoh corporate officers and employees (except employees of Ricoh Sales Offices) from having access to such reports.

14. *Trademarks*

14.1 Dealer shall not alter, obliterate, deface or remove any trade name, brand, trademark, service mark or serial number carried on any Product or on the packaging in which such Product is enclosed or add any name, brand, trademark or service mark. Dealer shall not use any part of any Ricoh or Ricoh affiliate name, trade name, brand, trademark or service mark in connection with its own name or trade name, trademarks, service marks or otherwise in identifying its business. Dealer shall not acquire, and specifically disclaims, any right or license in the names "Ricoh

of America", "Ricoh" or the name of any Ricoh affiliate, any names or numbers relating to the products or other Ricoh or Ricoh affiliate products, and any other Ricoh or Ricoh affiliate trade names, brands, trademarks or service marks, all of which are and shall remain the sole and exclusive property of Ricoh or its affiliates. Dealer's sole right under this Section 14.1 shall be to state orally or in writing that it is an authorized dealer for certain Ricoh copiers but no such statement may include or refer to any Ricoh or Ricoh affiliate trademark.

15. *Confidentiality*

15.1 Dealer shall not at any time hereafter, without the prior written consent of Ricoh in each particular case, disclose to or use or furnish for the benefit of any other person, firm, corporation or other entity (other than Ricoh) any proprietary information, trade secrets, confidential data or know-how of Ricoh relating to the Products which is made or becomes accessible to dealer, unless such information shall have become public or general industry knowledge. Dealer shall take all reasonable measures to ensure the secrecy of any such information, including, without limitation, securing from its employees confidentiality agreements containing terms similar to those set forth in this Section 15.1. Dealer shall return any such information, to the extent practicable, to Ricoh immediately upon Ricoh's request. It is specifically agreed that, in the event of a breach or a threatened breach by Dealer (or its employees or former employees) of the terms of this Section 15.1, Ricoh shall be entitled to an injunction restraining Dealer or such other person from committing or continuing to commit any such breach, without showing or proving actual damage sustained by Ricoh.

16. *Modification of Products*

16.1 Ricoh may discontinue the sale of, change, modify or alter any Product without notice to Dealer.

16.2 Dealer shall notify Ricoh in advance of changing, modifying or altering any Product, and, if in Ricoh's judgment such proposed change, modification or alteration will impair the quality or customer desirability of such Product, Ricoh may prohibit such change, modification or alteration.

17. *Duration and Termination*

17.1 Dealer may at any time, with or without cause, terminate this Agreement upon 30 days prior written notice to Ricoh.

17.2 If, in any manner whatsoever, Dealer fails or refuses to comply substantially with any material obligation under this Agreement, Ricoh may at any time thereafter send written notice of such failure or refusal and upon the giving of such notice or upon the expiration of any required statutory period for termination, this Agreement shall be terminated in its entirety, or at Ricoh's option this Agreement shall be terminated as to the portions of Dealer's Territory designated by Ricoh in such written notice, or shall be modified as Ricoh in its discretion shall determine. Illustrative examples of such grounds for termination by Ricoh include, without limitation, Dealer's failure or default in rendering payments to Ricoh (including but not limited to Pass-over payments and amounts owed to Ricoh by Dealer on credit sales), failure to comply with any of the minimum purchase requirements established pursuant to Section 7 within the time allowed by such Section, failure adequately to service the Products or use its best efforts in marketing the Products, all as may be determined by Ricoh. Other grounds for termination include

any knowing misrepresentation in or falsification of any report submitted by Dealer to Ricoh.

17.3 Ricoh may at its option terminate this Agreement by written notice at any time after the entry of a decree or order for relief in respect of Dealer by a court having jurisdiction in the premises in an involuntary case under Federal bankruptcy law, as now or hereafter constituted, or any other applicable Federal or State bankruptcy, insolvency or other similar law, or appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator, other similar official in respect of Dealer or of any substantial part of its property, or ordering the winding up or liquidation of its affairs, and the continuance of any such decree or order unstayed and in effect for a period of 60 consecutive days; or the commencement by Dealer of a voluntary case under Federal bankruptcy law, as now or hereafter constituted, or any other applicable Federal or State bankruptcy, insolvency, or other similar law, or the consent by it to the entry of an order for relief in an involuntary case under any such law, or the consent by it to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator or similar official in respect of Dealer or of any substantial part of its property, or the making by it of an assignment for the benefit of creditors, or the failure by it generally to pay its debts as they become due; or after Dealer or any of Dealer's partners or other principals has been convicted of any misdemeanor or felony. In addition, Ricoh may at its option terminate this Agreement in the event of the sale or transfer of all or substantially all of the assets of Dealer; a merger or consolidation to which Dealer is a party; or a transfer of all or any part of the equity securities or other interest of the current principals of Dealer so as to result in a change in the ownership, effective voting control or management of Dealer.

17.4 Upon any termination of this Agreement, Ricoh may elect to cancel any or all unfilled orders and Ricoh shall repurchase from Dealer all or any portion of Dealer's inventory of Products contained in packages which have not been opened, at the invoice price to Dealer as determined from Ricoh's records. Dealer shall resell to Ricoh any other Products which Ricoh elects to repurchase, at the invoice price to Dealer. Ricoh shall make transportation arrangements for moving said inventory from Dealer's premises after Dealer has prepared such inventory for shipment, and Ricoh shall assume the transportation costs involved. Dealer shall prepare such inventory for shipment within 30 days of termination of this Agreement. In addition, upon any such termination, Dealer shall return any and all promotional or procedural materials furnished by Ricoh.

17.5 Subsequent to any termination of this Agreement, Ricoh will sell to Dealer on a cash with order basis, subject to reasonable availability, reasonable quantities of supplies and spare parts for Products placed in the field by the Dealer prior to termination.

17.6 Any termination of this Agreement shall in no way affect the rights and liabilities of either Dealer or Ricoh arising during the period in which this Agreement was effective, or release either Dealer or Ricoh from the obligation to make any payment which such party became obligated to make during such period.

18. *General Provisions*

18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough

of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

18.2 The failure of Dealer or Ricoh at any time to exercise any of their respective rights under this Agreement shall not be deemed a waiver, nor shall such failure in any way prevent Dealer or Ricoh from subsequently asserting or exercising such rights. This Agreement is intended to be a final expression, and a complete and exclusive statement regarding the subject matter of this Agreement and supersedes any prior oral statements or agreements between the parties. Schedules and Riders attached hereto and written communications, including without limitation the Ricoh Dealer Operations Manual and the Ricoh Major Account Manual issued by Ricoh pursuant to this Agreement, shall be deemed to be part of this Agreement and shall be complied with by Dealer as if fully set forth herein. No waiver or modification of any of the terms of this Agreement shall be effective unless in writing and signed by both parties. All communications issued pursuant to, or required by, this Agreement shall be ineffective unless in writing and signed by the party originating such communication. Where the Agreement requires a communication from Ricoh, such communication shall be ineffective unless in writing and signed by a corporate officer of Ricoh, or a person designated in writing by a corporate officer.

18.3 Notices as to disputes or termination to be given under this Agreement shall be signed by the party giving such notice and mailed by certified or registered mail, addressed to the party to be notified at its then current business address as set forth at the beginning of this Agreement or as subsequently changed by giving notice. Notices as to address changes, pricing changes, warranty changes and

other matters relating to policy and business may be given by telex, telegram or first class mail. Notices by mail shall be deemed given three days after mailing.

18.4 Both Ricoh and Dealer shall act as principals in all respects concerning this Agreement and neither shall act or hold itself out as the agent, partner or joint venturer of the other, except to the extent that activities pursuant to the Major and Government Account Program may be deemed to constitute Ricoh or Dealer an agent of the other.

18.5 If any term or provision of this Agreement, or its application to any person or circumstances, shall be invalid or unenforceable, the remainder of this Agreement, or its application to any person or circumstances other than those as to which it is invalid or unenforceable, shall not be affected, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

18.6 Dealer may not assign this Agreement or any of Dealer's rights under this Agreement, nor may Dealer delegate any of its duties under this Agreement.

This Agreement is dated as of the date first above written and shall become effective only upon execution by an authorized official of each of Dealer and Ricoh.

RICOH OF AMERICA, INC.

By John E. Stuart

Title General Manager

DEALER

Company The Stewart Organization, Inc.

By Walter H. Stewart

Title Pres.

SCHEDULE A

Dealer's Territory

Dealer's Territory is as described below:

Huntsville, AL.

Counties:

Limestone
Morgan
Madison
Marshall
Jackson
DeKalb

SCHEDULE B

Dealer's Place of Business
For Promotion and Display of Products

Dealer shall display products and promotional material made available by Ricoh at, and shall list as its address in connection with its advertising of Ricoh Products, only the locations designated below:

2600 Newby Rd.
Suite D
Huntsville, AL. 35805

• • •

FILED
NOV 27 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, an individual; and JAMES S. SNOW, JR., an individual,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. CV-84-AR-2460-S
RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,	)	
Defendants.	)	

AFFIDAVIT OF WALTER H. STEWART

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned Notary Public, personally appeared Walter H. Stewart, who being duly sworn under oath, deposes and says as follows:

1. My name is Walter H. Stewart. I am presently a part owner and president of The Stewart Organization, Inc., and the following facts are personally known to me.

2. During the fall of 1982 I was approached by Bob Banks, who stated that he was a representative of Ricoh,

headquartered in Atlanta, Georgia, and requested that The Stewart Organization attend an exhibition of Ricoh's new products at the Birmingham Hyatt House.

3. I attended the exhibition, along with Larry Coker, who was then president of The Stewart Organization, and Tom Tapley, who was head of my field engineering staff. At the exhibition I recall meeting with Bob Banks and Bill Johnson, who stated that he was head of Ricoh's southern area zone, headquartered in Atlanta. I also recall that Bill Watson, the national sales manager for Ricoh, came in and talked for ten to fifteen minutes. We remained at the exhibition for several hours, and at that time seriously discussed The Stewart Organization becoming a Ricoh dealer.

4. Thereafter, Bob Banks came to Birmingham several times to talk with me regarding whether The Stewart Organization would become a Ricoh dealer. Ultimately the decision was made that The Stewart Organization would become a Ricoh dealer, and Bob Banks came to Birmingham on February 12, 1983, for the purpose of entering into a dealer sales agreement between Ricoh and The Stewart Organization.

5. While the matters of that day were basically uneventful, I distinctly recall watching Bob Banks fill out the blanks on page one of the dealer sales agreement and the attachments that designated my place of business, my territory, and my sales quotas. I recall thereafter beginning a cursory review of the filled-in copy of the dealer sales agreement, during which I objected to the termination date, which is set forth immediately below the filled-in blanks on page one. When I objected to the termination date, Bob Banks informed me that this was the only contract and that it could not be altered in any way. I also recall that I did not have time to read the contract in its entirety, because Bob Banks was in a hurry to catch a plane

out of town. Bob Banks told me just to sign the agreement and that he would send me a copy.

6. At no time during my course of discussions with Bob Banks about becoming a Ricoh dealer, or at any time prior to the signing of the dealer sales agreement, did anyone mention to me anything about forum selection, choice of forum, or for that matter, the state of New York. I did not have an opportunity to read such provision in the agreement, and had to have my attorney, after the filing of Ricoh's pleading in this case, explain to me what it means.

7. All of my transactions and contacts with representatives of Ricoh occurred in Birmingham, Alabama. All of the people I dealt with from Ricoh were headquartered in Atlanta, Georgia, except for Bill Watson, the national sales manager who attended the Ricoh exhibition for ten to fifteen minutes, who I understand has his offices at the corporate office in New Jersey.

8. All of my employees who might testify at the trial of this case live in Alabama. All of the customers to whom I sold Ricoh copiers which proved to be defective reside in Alabama. All of the Ricoh copiers I sold were sold to Alabama residents.

9. If I were forced to litigate this case in New York, I would be unable to afford the expense of transporting witnesses and evidence to New York, not to mention the expense of retaining legal counsel in New York.

10. To my knowledge, Ricoh is still transacting business in Alabama through the following dealers or distributors:

A. B. Dick & Co., 726 Arcadia Circle, Huntsville, Alabama;

Copy Products Co., 3402 North Beltline Park Drive, Mobile, Alabama;

ACME Business Products, 4201 Nordale Drive, Montgomery, Alabama;

ABM Graphics, 217 Oxmoor Circle, Birmingham, Alabama.

/s/ WALTER H. STEWART

Walter H. Stewart

Sworn to and subscribed before me on this the 27 day of November, 1984.

/s/ DONNA LYNN GLASS

Notary Public

My Commission Expires:
11-19-86

FILED
NOV 29 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STEWART ORGANIZATION INC., a Corporation; WALTER H. STEWART, an Individual; and JAMES S. SNOW, JR., an Individual,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	CV-84-AR-2460-S
RICOH CORPORATION, a Corporation; RICOH OF AMERICA, INC., a Corporation,	)	
Defendants.	)	

AFFIDAVIT

STATE OF NEW JERSEY)
COUNTY OF ESSEX)

Before me, the undersigned authority, in and for said state and county, personally appeared John E. Stuart, who being by me first duly sworn, says as follows:

I, John E. Stuart, am presently employed as Senior Vice President for the Office Product Equipment Group by defendant Ricoh Corporation, the successor-in-interest of defendant Ricoh of America, Inc. (collectively referred to as

"Ricoh"). My office is presently located and at all times relevant to this action has been located at Ricoh corporate headquarters in West Caldwell and Fairfield, New Jersey, part of the New York City metropolitan area. During 1983, I was employed in the capacity of General Manager for Ricoh, and as such, was the principal official at Ricoh responsible for reviewing and approving contracts with prospective dealers of Ricoh office equipment products. I was the Ricoh official who signed and approved the Copier Products Retail Dealer Sales Agreement between Ricoh and The Stewart Organization, Inc. ("Stewart") dated February 12, 1983 and attest that the copy of that Agreement attached to defendants' Motion to Transfer is a true and correct copy.

Paragraph 18.1 of that Agreement states in pertinent part:

18. *General Provisions*

18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection herewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

On the basis of this clause in the Ricoh-Stewart Agreement, I give this affidavit in support of defendant's Motion to Transfer.

The Ricoh Corporation maintains its main corporate headquarters in West Caldwell, New Jersey, part of the New York City metropolitan area. In addition, it has seven other office locations spread throughout the New York City

metropolitan area, including three office locations in the Borough of Manhattan in New York City.

As Senior Vice President for the Office Product Equipment Group at Ricoh, I have personal knowledge of Ricoh policy and practices in negotiating and servicing its dealer contracts. In particular, I am personally familiar with Ricoh pricing policies as well as with other aspects of Ricoh's dealership contracts. On the basis of information provided to me by counsel for Ricoh, either I, my superiors, or employees under my supervision, all of whom are located at Ricoh headquarters in the New York City metropolitan area, will be called upon to provide information or testimony with regard to plaintiffs' antitrust claims in the present action.

In addition, on the basis of information provided to me by counsel for Ricoh, I am informed that Ricoh dealer files and other documents relating to Ricoh's relationship with all of its dealers might be relevant to discovery on the antitrust and warranty claims made by plaintiffs. Many of these files and documents are located at Ricoh corporate headquarters in the New York City metropolitan area, and they occupy well over twenty-five (25) file cabinets. Further, these files are used on a daily basis by Ricoh personnel, and it would cause significant disruption and inconvenience of Ricoh's business operations if these files had to be either transported to Birmingham, Alabama for purposes of this action or copied and copies of these voluminous files transported to Birmingham, Alabama for purposes of this action.

As Senior Vice President of Office Product Equipment, I also have personal knowledge of the technical qualities of Ricoh products and am informed by counsel for Ricoh that either I, my superiors or employees under my supervision, most of whom are located at Ricoh corporate headquarters in the New York City metropolitan area, will be called up-

on to provide information or testimony with respect to plaintiffs' claims of breach of warranty of merchantability and breach of warranty of fitness for a particular purpose. Moreover, many of the files and documents relating to these warranty claims are located at Ricoh corporate headquarters in the New York City metropolitan area. It would cause significant inconvenience and disruption to Ricoh's business affairs if these documents had to be copied and transported to Birmingham, Alabama, and if I and other Ricoh officials located at Ricoh corporate headquarters were forced to come to Birmingham, Alabama to testify with regard to plaintiffs' warranty claims.

In sum, on the basis of information provided to me by counsel for Ricoh, it is apparent to me that many of the documents necessary for discovery on plaintiffs' antitrust and warranty claims as well as many of the Ricoh officials knowledgeable about issues relating to plaintiffs' antitrust and warranty claims are located at Ricoh corporate headquarters in the New York City metropolitan area.

I have read the foregoing affidavit and the statements and matters contained therein are true and correct.

/s/ JOHN E. STUART

John E. Stuart

SUBSCRIBED and sworn to before me a Notary Public this 27th day of November, 1984.

/s/ LINDA A. O'KEEFE

Notary Public

FILED
NOV 29 1984

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

THE STEWART ORGANIZATION, INC. et al,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. CV-84-AR-2460-S
RICOH CORPORATION, et al,	)	
Defendants.	)	

MOTION TO STRIKE AFFIDAVIT OF JOHN E. STUART

Come now plaintiffs in the above-styled cause and move this Honorable Court to strike the Affidavit of John E. Stuart because it is an improper affidavit filled with hearsay allegations. Rather than simply setting forth factual matters of which Mr. Stuart has first-hand knowledge, this affidavit is replete with hearsay renditions of what counsel for Ricoh has told Mr. Stuart regarding this case. Numerous statements contained in this affidavit are prefaced by such language as "on the basis of information provided to me by counsel for Ricoh, I am informed . . . ." All statements prefaced or introduced by this blatant recognition of their hearsay nature are completely improper for inclusion in an affidavit.

Therefore, plaintiffs move that this honorable Court strike the Affidavit of John E. Stuart in its entirety or, in the alternative, strike the portions thereof which are clearly, by Mr. Stuart's own admission in his affidavit, based on hearsay.

ENTERED JAN 29 1985
GRANTED 1/29/85

/s/ WILLIAM M. ACKER, JR.

Respectfully submitted,

/s/ JWL
Joseph W. Letzer

/s/ JANET L. HUMPHREYS
Janet L. Humphreys
Attorney for Plaintiffs

OF COUNSEL:
THOMAS, TALIAFERRO, FORMAN, BURR & MURRAY
1600 Bank for Savings Building
Birmingham, Alabama 35203
(205) 251-3000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Strike Affidavit of John E. Stuart will be served by placing a copy of same in hand to Scott Phelps, Bradley Arant, Rose & White, 1400 Park Place Tower, Birmingham, Alabama 35203 on this the 29th day of November, 1984.

/s/ JANET L. HUMPHREYS
Of Counsel

FILED
JAN 29 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

THE STEWART ORGANIZATION, INC., a Corporation; WALTER H. STEWART, an Individual; and JAMES S. SNOW, JR., an Individual,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. CV-84-AR-2460-S
RICOH CORPORATION, a Corporation; RICOH OF AMERICA, INC., a Corporation,	)	
Defendants.	)	

AFFIDAVIT

STATE OF GEORGIA)
COUNTY OF FULTON)

Before me, the undersigned authority, in and for said state and county, personally appeared Robert W. Banks, who being by me first duly sworn, says as follows:

I, Robert W. Banks, am presently employed, and at all times relevant to this action have been employed, as a Regional Sales Manager of defendant Ricoh of America, Inc. and its successor-in-interest, Ricoh Corporation ("Ricoh"). As such, I had primary responsibility for dealing with the Stewart Organization, Inc. ("Stewart"). I am personally

familiar with the Ricoh-Stewart Dealership Sales Agreement, and am knowledgeable with regard to Ricoh's obligations under that Agreement.

Pursuant to its Agreement with Stewart, Ricoh agreed to provide the Stewart sales personnel with sales training and to provide the Stewart technical staff with repair and maintenance training. Ricoh fulfilled this obligation by providing one week sales training courses in Birmingham, Alabama and Nashville, Tennessee for Stewart's salesmen and by offering Stewart's service personnel a one week training course in Fairfield, New Jersey and Los Angeles, California.

In addition, pursuant to the Dealership Agreement, Ricoh agreed to provide Stewart with advertising support to assist Stewart in marketing Ricoh products. Ricoh fulfilled this commitment by providing Stewart with an advertising credit of Ten Thousand Dollars ($10,000.00), which was applied by Ricoh against purchases made by Stewart during 1983. Finally, in addition to these commitments, I and other Ricoh personnel provided Stewart with various other forms of technical, financial, and sales assistance pursuant to the terms of the Ricoh dealership agreement.

I have read the foregoing affidavit and the statements and matters contained therein are true and correct.

/s/ Robert W. Banks
Robert W. Banks

SUBSCRIBED and sworn to before me a Notary Public this ..... day of November, 1984.

/s/ D. W. Cook
Notary Public
Notary Public, Georgia,
State at Large
My Commission Expires
February 7, 1987

RICOH OF AMERICA, INC.

COPIER PRODUCTS RETAIL DEALER SALES AGREEMENT

AGREEMENT, made as of this 12th day of February, 1983, between RICOH OF AMERICA, INC. ("Ricoh"), a New York corporation with offices located at 20 Gloria Lane, Fairfield, New Jersey 07006 and The Stewart Organization Inc. ("Dealer"), a corporation, with offices located at 1210 S. 20th St., Birmingham, Alabama 35205. This Agreement shall expire on March 31, 1984, unless sooner terminated pursuant to Section 17 of this Agreement.

Statement of Understanding

Ricoh has undertaken the manufacture and development of a line of dry office copiers and desires to market certain of these products under the Ricoh brand name through an effective network of retailers. Ricoh recognizes the need for its technical and parts support to its retailers and wishes to provide its retailers with incentives and with a full range of services in order to encourage its retailers to effectively and aggressively to promote, market and service such products so as to achieve widespread user satisfaction with such products.

Dealer wishes to become an authorized retailer for certain Ricoh products and to carry out the aggressive and effective promotion, marketing and servicing of such products in the area described in Schedule A.

Accordingly, Ricoh and Dealer, in consideration of their mutual undertakings in this Agreement, agree as follows:

1. *Conduct of the Parties*

1.1 Ricoh and Dealer agree that throughout the term of this Agreement they will act in a fair, equitable and ethical manner to each other and to the end-user.

2. *Definitions*

2.1 The terms "acquire", "acquiring", "obtain" or "obtaining" (or any other derivative of acquire or obtain) means the purchase, lease or rental of Products.

2.2 The term "area" means an area assigned by Ricoh to a Retailer for marketing Products.

2.3 The term "Dealer's Territory" means the area designated in Schedule A as the area assigned to Dealer.

2.4 The term "end-user" means a customer who is acquiring Products for such customer's own needs, and not for sale.

2.5 The term "Government Account" means (a) an account of (i) the Government of the United States of America, its agencies, departments or branches, or (ii) any state or local (city or county) government, governmental agency, political subdivision, or branch, or (b) any person or entity entitled to obtain Products under or pursuant to any contract with any such account described in Section 2.5 (a).

2.6 The term "Major Account" means (a) a customer which obtains, which expresses an interest in obtaining, or which might be interested in obtaining two or more Ricoh dry office copiers to be installed in each of two or more locations, or (b) a customer which obtains, which expresses an interest in obtaining, or which might be interested in obtaining more than 10 Ricoh dry office copiers to be installed in Dealer's Territory.

2.7 The term "market" means sell, rent, lease, promote and provide installation and warranty service.

2.8 The term "Products" or "Product" means any and all of the following dry office copiers marketed under the Ricoh brand name: Model Numbers FT 4030, FT 4060, FT 6200, FT 6600 (and any other model numbers as from time to time may be added by Ricoh in its discretion

in written Addenda to this Agreement) and any Ricoh accessories, supplies and replacement parts for such dry office copiers as may from time to time be made available by Ricoh.

2.9 The term "Retailer" means any individual or other entity authorized by Ricoh to sell Products in a designated area.

2.10 The term "sell", "selling", "sale", "sold" or "sells" (or other derivatives of sale or sell) means the sale, lease or rental of Products.

2.11 The term "Service Representative" means an individual who has successfully completed the course given at a Ricoh Technical Training Center.

2.12 The term "Warranty Service" means repair or replacement of Products during the period and under terms described in Section 9.2.

3. *Dealer's Appointment*

3.1 Ricoh appoints Dealer as a Retailer of the Products. Dealer's primary responsibility shall be to market Products in Dealer's Territory. **SUCH APPOINTMENT IS NOT EXCLUSIVE, AND RICOH MAY IN ITS SOLE DISCRETION WITHOUT CAUSE APPOINT OTHER RETAILERS AS DEALERS WHO SHALL BE LOCATED IN AND WHOSE PRIMARY RESPONSIBILITY SHALL BE TO MARKET PRODUCTS IN DEALER'S TERRITORY.** Such additional appointment or appointments shall not itself operate as a termination of the Agreement.

3.2 In consideration of its appointment as Dealer:

(a) Dealer agrees, when requested by Ricoh, to offer installation and Warranty Service with respect to all Products installed in Dealer's Territory (whether or not such Products were sold by Dealer), except that Dealer shall not be required to offer installation or Warranty Service with

respect to any Product sold by another Retailer for installation in the area assigned to such other Retailer where such Retailer is capable of rendering such installation and Warranty Service; and

(b) Dealer agrees, when requested by Ricoh, to offer to each Major Account or Government Account which has acquired Products for installation in Dealer's Territory installation, Warranty Service, and such additional service as Ricoh shall have negotiated with such Major Account or Government Account.

3.3 Dealer shall maintain a place of business at which Dealer displays Products and promotional material made available by Ricoh only in the location or locations designated in Schedule B. If Dealer opens a branch at a location other than that designated in Schedule B, Dealer may display Products and such promotional material at such branch only upon written approval by Ricoh.

4. *Pass-over Program*

4.1 When Dealer sells Products which are to be installed in any area other than Dealer's Territory, it shall be Dealer's responsibility to pay to the Retailer in whose area the Products are to be installed (or if there is more than one Retailer in such area, to any such Retailer at Dealer's option) a uniform reasonable fee (as specified in writing in advance by Ricoh) to compensate such Retailer for its warranty and installation obligations and overhead expenses in relation to the Products. Such uniform reasonable fee shall be subject to change upon 30 days notice from Ricoh to all Retailers (including Dealer) and shall be payable by Dealer without regard to whether installation and Warranty Service are actually extended. If at any time Ricoh or any Retailer discovers that any such uniform reasonable fee payable by Dealer to such Retailer pursuant to the terms of this Section 4.1 has not yet been paid to such

Retailer, (a) Ricoh or such Retailer (as the case may be) may notify Dealer, (b) within 10 days of receipt of such notice Dealer shall pay to such Retailer all portions of such uniform reasonable fee and (c) if within such time Dealer shall fail to pay such uniform reasonable fee, Ricoh shall invoice Dealer for such uniform reasonable fee and Dealer shall remit such uniform reasonable fee to Ricoh.

4.2 Ricoh shall use its best efforts to insert in contracts with other Retailers provisions similar to this Section 3.

4.3 The uniform reasonable fee, if any, which is paid to Ricoh pursuant to Section 4.1 or 4.2 will be paid by Ricoh to the Retailer in whose area the Products are installed (or if there is more than one Retailer in such area, to any such Retailer at Ricoh's option). Such payment will be made by Ricoh upon receipt by Ricoh of the payment from the selling Retailer, and will become a liability of Ricoh to the Retailer in whose area Products are installed only upon receipt by Ricoh of payment of the uniform reasonable fee from the selling Retailer.

5. *Government and Major Account Program*

5.1 It is understood and mutually agreed that in order to maximize distribution of the Products, it is necessary for Ricoh and Dealer to comply with the Ricoh Major Account Manual, as amended from time to time, and that by signing this Agreement, Ricoh and Dealer agree to so comply.

5.2 Under the Major and Government Account Program:

(a) Ricoh retains the right to solicit orders for Products from all customers that it determines might be Major Accounts or Government Accounts.

(b) Dealer, when it determines that a customer

might be a Major Account or a Government Account, may continue to pursue a sale with such Major Account or Government Account and/or may advise Ricoh of the identity of the Major Account or Government Account, all as provided in the Ricoh Major Account Manual as amended from time to time.

(c) If Ricoh negotiates a contract or concludes a sale to a Major Account or Government Account, Dealer shall participate in such contract or sale, as described in and in compliance with the Ricoh Major Account Manual, as amended from time to time, and with the terms, provisions and conditions of such contract or sale. Ricoh may direct Dealer to, and Dealer shall, install and service Products in such accounts (if such installation or service is to be performed (i) in Dealer's Territory or (ii) (x) within a 60 mile radius of an office location of Dealer, (y) not located in any area assigned to any other Retailer and (z) closer to an office location of Dealer than to an office location of any other Retailer), in which case Ricoh shall pay to Dealer such installation and service fees as Ricoh shall from time to time establish in writing, which fees shall, at a minimum, in Ricoh's good faith judgment cover Dealer's anticipated installation and servicing costs.

(d) Subject to the terms of the Ricoh Major Account Manual as amended from time to time, if Ricoh concludes a sale to a Major Account or Government Account and if Dealer was, in Ricoh's judgment, instrumental to Ricoh's conclusion of such sale, Ricoh shall award Dealer sales commissions (in such amounts as Ricoh shall from time to time establish in writing with respect to such sale).

(e) Dealer acknowledges that it is without authority to, and shall not, modify or change any term or condition of any contract or sale described in Section 5.2 (c). Dealer agrees to indemnify Ricoh for all lost profits, costs, ex-

penses or damages incurred or paid by Ricoh arising from Dealer's non-compliance with this Section 5 or any provision of the Ricoh Major Account Manual, as amended from time to time (including, without limitations, lost profits, costs, expenses or damages arising from price reductions and price rebates which Ricoh is required to grant due to Dealer's non-compliance with such sections).

(f) Changes in fees and commission established pursuant to Section 5.2(c) and 5.2(d) shall be effective 30 days after the date of any notice of such changes.

(g) Ricoh agrees to refer to Dealer or some other Retailer (which may be wholly or partially owned by Ricoh) whose primary responsibility is the marketing of Products in Dealer's Territory all customers which Ricoh solicits and which Ricoh determines are not Major Accounts or Government Accounts, but which expresses an interest in purchasing Products for installation in Dealer's Territory.

6. *Promotion and Marketing*

6.1 Dealer shall at all times (a) devote its best efforts to market the Products, (b) display demonstration Products in good working order in its place of business, (c) utilize Ricoh advertising and promotional materials made available by Ricoh to Dealer and (d) maintain commercial telephone listings indicating that Dealer has Products for sale.

6.2 Ricoh shall contribute to advertising by Dealer in an amount to be determined by Ricoh. It is understood that in order for Dealer to qualify for this contribution, the format of the advertisement must be approved by Ricoh.

6.3 Ricoh may require the participation of sales employees of Dealer in Ricoh sales training programs.

6.4 Dealer agrees to conform its sales procedures to the procedures established in the Ricoh Field Manual, as distributed and amended from time to time by Ricoh.

7. *Sales Requirements*

7.1 Dealer shall purchase from Ricoh for sale and installation at locations of end-users in Dealer's Territory, during the indicated periods, those minimum quantities, set forth in Schedule C, of the indicated models of Products purchased from Ricoh by Dealer; *provided, however,* if Dealer shall fail to purchase such quantities but Dealer has purchased in such period at least 30% of such minimum quantities for all of the indicated models of Products, then Dealer shall be entitled, for the purpose of determining its compliance with the minimum quantities set forth in Schedule C for such indicated period, to convert purchased units of other models into units of any underpurchased model, pursuant to the Conversion Chart set forth in Schedule C: *provided further, however,* that conversion will be permitted only when in such indicated period the specified minimum quantity set forth in Schedule C for the model to be converted has been complied with, and only to the extent that after such conversion, the number of units purchased of the model to be converted (not including those units so converted) is equal to or exceeds the specified minimum quantity for such model.

7.2 In addition to complying with the minimum quantities set forth in Schedule C as required by Section 7.1, Dealer shall purchase, during the first three months of any indicated period, at least 30% of such minimum quantities for such indicated period for all of the indicated models of Products.

7.3 Dealer shall submit installation reports (the form of which is attached hereto as Exhibit A) to Ricoh. Such reports must be submitted monthly and must be received

by Ricoh (at its office at 20 Gloria Lane, Fairfield, New Jersey) no later than the seventh day of the month following the month for which such report is made. Either the failure to submit such reports in a timely manner or the submission of false reports shall constitute a material breach of this Agreement.

8. *Terms of Sale; Financing*

8.1 Ricoh shall sell and Dealer shall buy the Products at Ricoh's Dealer prices in effect on the date of shipment. Each sale by Ricoh and purchase by Dealer shall be governed by the terms and conditions of sale in effect at the time of sale as appearing on the invoices or other printed material issued by Ricoh. Ricoh may alter its Dealer prices or its terms and conditions of sales or may discontinue the sale of any Product at any time without prior notice, but shall endeavor to give Dealer 30 days notice prior to any such change becoming effective. Dealer shall be responsible for and shall pay any present or future sales, use, excise or other similar tax applicable to the sale, use, transportation or addition to value of the Products. Unless otherwise expressly set forth in writing on any invoice or shipping document, all prices are F.O.B. the Ricoh distribution facility for Products nearest to Dealer's Territory. Dealer shall bear all costs, insurance premiums, freight and all other charges and expenses incurred after Ricoh has placed the Products in the custody of a carrier at such Ricoh distribution facility.

8.2 Dealer has the option of (a) enclosing a check or sight draft with an order for Products, in the full amount of the order less a cash discount in such amount as may be specified in writing from time to time by Ricoh, or (b) purchasing products on credit, to the extent of Dealer's credit line as established in writing from time to time by Ricoh, in which latter case Ricoh may require Dealer to

grant to Ricoh a security interest as more fully set forth in a separate Security Agreement between Ricoh and Dealer.

8.3 In the event Dealer does not pay to Ricoh any amounts owing to Ricoh pursuant to this Agreement within the time specified by Ricoh, or if Ricoh has good cause to believe Dealer's creditworthiness is diminished, or if Ricoh deems itself insecure, (a) Ricoh may reduce, modify or eliminate Dealer's credit line with Ricoh, (b) Ricoh may decline to accept further orders from Dealer or decline to make further deliveries to Dealer or (c) Ricoh may elect to make further deliveries only on a cash-with-order basis or to require Dealer to provide adequate assurance of Dealer's creditworthiness prior to making any further deliveries to or for the account of Dealer.

8.4 For purposes of this Section 8 only, the terms "sale", "sell" or "sold" (or any derivative of sale or sell) shall not include the lease or rental of Products.

9. *Warranty; Limitation of Warranty*

9.1 Ricoh warrants exclusively to Dealer that all parts originally incorporated in each copier or accessory sold to Dealer by Ricoh shall, at time of placement of such Product by Ricoh with a carrier for shipment to Dealer, be free from defects in material and workmanship until the earlier of (a) 150 days after placement by Ricoh of such Product with a carrier for shipment, and (b) 90 days after installation of such Product at the location of the end-user, *provided, however,* that in the case of consumable parts as identified by Ricoh from time to time in writing (including, without limitation, scheduled maintenance parts, as that term is used in the Ricoh Dealer Operations Manual, and supplies) Ricoh warrants exclusively to Dealer that it will repair any such part which is discovered to be defective before *there has been produced, by the Product* into which the consumable parts are incorporated, the number of

copies specified from time to time in writing by Ricoh for purposes of warranty; *provided, further, however*, that all warranties described in this Section 9.1 shall be ineffective in this case of (i) any Product that has been subjected to misuse, mishandling, misapplication, neglect, accident, improper repair, damage by circumstances beyond Ricoh's reasonable control or modification by Dealer (whether or not authorized by Ricoh) (including but not limited to use of unauthorized parts), (ii) insignificant defects such as scratches which are not prominent, minor mechanical or electrical maladjustment, or random manufacturing errors which can be easily corrected or (iii) replacement parts or supplies not originally incorporated in any Ricoh dry office copier. The remedy under all warranties is limited solely to the repair or replacement of the malfunctioning parts. All warranties shall be effective only if (x) an installation report is submitted pursuant to and within the time required by Section 9.3. THE WARRANTIES SET FORTH ABOVE ARE EXCLUSIVE AND IN LIEU OF, AND RICOH EXPRESSLY DISCLAIMS, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. RICOH SHALL NOT HAVE ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE USE OR PERFORMANCE OF THE PRODUCTS.

9.2 Dealer shall extend to the purchaser, renter or lessee of each Product installed in Dealer's Territory (whether or not sold by Dealer) a warranty with terms at least as favorable as Ricoh's warranty to Dealer set forth in Section 9.1, except that (a) Dealer shall not be required to offer a warranty period measured by the date of shipment

by Ricoh and (b) Dealer shall not be required to extend a warranty to Products sold by another Retailer for installation in the area assigned to such other Retailer where such Retailer is capable of rendering such warranty.

9.3 In the event Products or parts thereof require repair or replacement during the warranty period described in Section 9.1, Dealer is required to provide such repair or replacement services. Ricoh shall in consultation with Dealer determine whether the Products or parts thereof shall be repaired or replaced. In the event that Ricoh determines that replacement is necessary, Ricoh shall reimburse Dealer for the costs of replacement or Ricoh shall itself provide replacements. In no event shall Ricoh be responsible for any labor costs incurred in provision of Warranty Service. Within 60 days of extending Warranty Service, Dealer shall submit to Ricoh a warranty claim on a form provided by Ricoh.

9.4 In no event shall Ricoh have any responsibility for any damage caused to the Products during shipment to Dealer. It shall be the sole responsibility of Dealer to file appropriate claims for reimbursement with the carrier.

10. *Force Majeure*

10.1 Ricoh shall use its best efforts to make prompt and timely shipments of orders submitted by Dealer, but shall not be liable for failure to provide products or for delay in shipment of Products where such failure or delay is the result of strikes, lockouts, accidents, fire, delays in manufacture, transportation or delivery of materials, acts of God, embargoes, governmental or judicial actions or any other causes beyond Ricoh's reasonable control.

10.2 Dealer shall have a reasonable time to cure any default under this Agreement which default was caused solely by Ricoh's failure to provide to Dealer in a timely fashion Products ordered by Dealer.

11. *Service Representatives*

11.1 In order to promote prompt and efficient service of Products, Dealer shall have in his employment, for each location designated in Schedule B:

(a) Within 90 days of execution of this Agreement, at least two Service Representatives whose principal place of employment shall be not more than 30 miles from such location, so that the minimum number of Service Representatives of Dealer shall be the product of multiplying two by the number of locations specified in Schedule B;

(b) After the 90th day following the date of the execution of this Agreement, the number required by Section 11.1 (a), plus a sufficient number of Service Representatives such that the ratio of the number of any particular model of Ricoh copier purchased by Dealer to the number of Service Representatives trained to service that model does not exceed 100/1 (one hundred to one), so that at all times that this Agreement is in effect, the ratio of the total number of Ricoh copiers purchased by Dealer to the total number of Service Representatives does not exceed 100/1 (one hundred to one).

11.2 Ricoh agrees to train these representatives at a Ricoh Technical Training Center, and to provide lodging for the representatives while they attend a Ricoh Technical Training Center. Dealer agrees to pay its representatives' travel expenses to, and salary while attending, such a Center.

11.3 Dealer agrees that when it repairs, installs or otherwise services Products, it shall permit only Service Representatives to provide such services.

11.4 Dealer agrees that, as a pre-condition of admission of an individual to a Ricoh Technical Training Center, (a) Dealer must certify, on a form provided by Ricoh, that the individual is a Dealer employee and (b) the individual must successfully pass an entrance examination given by Ricoh.

11.5 Ricoh may, at its discretion, decline to deliver any particular Product to any location of any Retailer until there is one employee of such Retailer in the location to which such Product is to be delivered who is a Service Representative trained to service such Product.

12. *Replacement Part Requirements and Recommendations*

12.1 It is understood and mutually agreed that, in consideration of Dealer's appointment pursuant to this Agreement and in order to ensure that Dealer has sufficient parts to service Products effectively, Dealer will purchase a basic stock kit consisting of the items, and in the quantities, specified in writing by Ricoh (the "Basic Stock Kit").

12.2 Dealer shall have the Basic Stock Kit in his possession before commencing sales of the Products, but may not purchase the Basic Stock Kit until he employs at least one Service Representative.

12.3 It is recommended that Dealer also at all times after commencing sales of the Products have in his possession additional replacement parts, meeting the specifications and in the quantities listed in writing by Ricoh.

12.4 When repairing, installing or otherwise servicing the Products, Dealer shall use only replacement parts meeting the specifications listed from time to time in writing by Ricoh.

13. *Records and Reports*

13.1 It is understood and mutually agreed that in order for Ricoh to determine Dealer's creditworthiness for the purposes of Section 8, it is necessary for Dealer to submit timely and accurate reports to Ricoh. Therefore, Dealer agrees to furnish financial statements (audited, if avail-

able) to Ricoh from time to time upon request by Ricoh, such statements to include Dealer's then current balance sheet, income statement, sales figures and any other financial information which Ricoh may reasonably request.

13.2 Ricoh shall treat reports submitted pursuant to Section 13.1 as confidential, and shall endeavor to prevent anyone other than Ricoh corporate officers and employees (except employees of Ricoh Sales Offices) from having access to such reports.

14. *Trademarks*

14.1 Dealer shall not alter, obliterate, deface or remove any trade name, brand, trademark, service mark or serial number carried on any Product or on the packaging in which such Product is enclosed or add any name, brand, trademark or service mark. Dealer shall not use any part of any Ricoh or Ricoh affiliate name, trade name, brand, trademark or service mark in connection with its own name or trade name, trademarks, service marks or otherwise in identifying its business. Dealer shall not acquire, and specifically disclaims, any right or license in the names "Ricoh of America", "Ricoh" or the name of any Ricoh affiliate, any names or numbers relating to the products or other Ricoh or Ricoh affiliate products, and any other Ricoh or Ricoh affiliate trade names, brands, trademarks or service marks, all of which are and shall remain the sole and exclusive property of Ricoh or its affiliates. Dealer's sole right under this Section 14.1 shall be to state orally or in writing that it is an authorized dealer for certain Ricoh copiers but no such statement may include or refer to any Ricoh or Ricoh affiliate trademark.

15. *Confidentiality*

15.1 Dealer shall not at any time hereafter, without the prior written consent of Ricoh in each particular case,

disclose to or use or furnish for the benefit of any other person, firm, corporation or other entity (other than Ricoh) any proprietary information, trade secrets, confidential data or know-how of Ricoh relating to the Products which is made or becomes accessible to dealer, unless such information shall have become public or general industry knowledge. Dealer shall take all reasonable measures to ensure the secrecy of any such information, including, without limitation, securing from its employees confidentiality agreements containing terms similar to those set forth in this Section 15.1. Dealer shall return any such information, to the extent practicable, to Ricoh immediately upon Ricoh's request. It is specifically agreed that, in the event of a breach or a threatened breach by Dealer (or its employees or former employees) of the terms of this Section 15.1, Ricoh shall be entitled to an injunction restraining Dealer or such other person from committing or continuing to commit any such breach, without showing or proving actual damage sustained by Ricoh.

16. *Modification of Products*

16.1 Ricoh may discontinue the sale of, change, modify or alter any Product without notice to Dealer.

16.2 Dealer shall notify Ricoh in advance of changing, modifying or altering any Product, and, if in Ricoh's judgment such proposed change, modification or alteration will impair the quality or customer desirability of such Product, Ricoh may prohibit such change, modification or alteration.

17. *Duration and Termination*

17.1 Dealer may at any time, with or without cause, terminate this Agreement upon 30 days prior written notice to Ricoh.

17.2 If, in any manner whatsoever, Dealer fails or refuses to comply substantially with any material obligation under this Agreement, Ricoh may at any time thereafter send written notice of such failure or refusal and upon the giving of such notice or upon the expiration of any required statutory period for termination, this Agreement shall be terminated in its entirety, or at Ricoh's option this Agreement shall be terminated as to the portions of Dealer's Territory designated by Ricoh in such written notice, or shall be modified as Ricoh in its discretion shall determine. Illustrative examples of such grounds for termination by Ricoh include, without limitation, Dealer's failure or default in rendering payments to Ricoh (including but not limited to Pass-over payments and amounts owed to Ricoh by Dealer on credit sales), failure to comply with any of the minimum purchase requirements established pursuant to Section 7 within the time allowed by such Section, failure adequately to service the Products or use its best efforts in marketing the Products, all as may be determined by Ricoh. Other grounds for termination include any knowing misrepresentation in or falsification of any report submitted by Dealer to Ricoh.

17.3 Ricoh may at its option terminate this Agreement by written notice at any time after the entry of a decree or order for relief in respect of Dealer by a court having jurisdiction in the premises in an involuntary case under Federal bankruptcy law, as now or hereafter constituted, or any other applicable Federal or State bankruptcy, insolvency or other similar law, or appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator or other similar official in respect of Dealer or of any substantial part of its property, or ordering the winding up or liquidation of its affairs, and the continuance of any such decree or order unstayed and in effect for a period of 60 consecu-

tive days; or the commencement by Dealer of a voluntary case under Federal bankruptcy law, as now or hereafter constituted, or any other applicable Federal or State bankruptcy, insolvency, or other similar law, or the consent by it to the entry of an order for relief in an involuntary case under any such law, or the consent by it to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator or similar official in respect of Dealer or of any substantial part of its property, or the making by it of an assignment for the benefit of creditors, or the failure by it generally to pay its debts as they become due; or after Dealer or any of Dealer's partners or other principals has been convicted of any misdemeanor or felony. In addition, Ricoh may at its option terminate this Agreement in the event of the sale or transfer of all or substantially all of the assets of Dealer; a merger or consolidation to which Dealer is a party; or a transfer of all or any part of the equity securities or other interest of the current principals of Dealer so as to result in a change in the ownership, effective voting control or management of Dealer.

17.4 Upon any termination of this Agreement, Ricoh may elect to cancel any or all unfilled orders and Ricoh shall repurchase from Dealer all or any portion of Dealer's inventory of Products contained in packages which have not been opened, at the invoice price to Dealer as determined from Ricoh's records. Dealer shall resell to Ricoh any other Products which Ricoh elects to repurchase, at the invoice price to Dealer. Ricoh shall make transportation arrangements for moving said inventory from Dealer's premises after Dealer has prepared such inventory for shipment, and Ricoh shall assume the transportation costs involved. Dealer shall prepare such inventory for shipment within 30 days of termination of this Agreement. In addition, upon any such termination, Dealer shall return any

and all promotional or procedural materials furnished by Ricoh.

17.5 Subsequent to any termination of this Agreement, Ricoh will sell to Dealer on a cash with order basis, subject to reasonable availability, reasonable quantities of supplies and spare parts for Products placed in the field by the Dealer prior to termination.

17.6 Any termination of this Agreement shall in no way affect the rights and liabilities of either Dealer or Ricoh arising during the period in which this Agreement was effective, or release either Dealer or Ricoh from the obligation to make any payment which such party became obligated to make during such period.

18. *General Provisions*

18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

18.2 The failure of Dealer or Ricoh at any time to exercise any of their respective rights under this Agreement shall not be deemed a waiver, nor shall such failure in any way prevent Dealer or Ricoh from subsequently asserting or exercising such rights. This Agreement is intended to be a final expression, and a complete and exclusive statement regarding the subject matter of this Agreement and supersedes any prior oral statements or agreements between the parties. Schedules and Riders attached hereto and written communications, including without limitation the

Ricoh Dealer Operations Manual and the Ricoh Major Account Manual issued by Ricoh pursuant to this Agreement, shall be deemed to be part of this Agreement and shall be complied with by Dealer as if fully set forth herein. No waiver or modification of any of the terms of this Agreement shall be effective unless in writing and signed by both parties. All communications issued pursuant to, or required by, this Agreement shall be ineffective unless in writing and signed by the party originating such communication. Where the Agreement requires a communication from Ricoh, such communication shall be ineffective unless in writing and signed by a corporate officer of Ricoh, or a person designated in writing by a corporate officer.

18.3 Notices as to disputes or termination to be given under this Agreement shall be signed by the party giving such notice and mailed by certified or registered mail, addressed to the party to be notified at its then current business address as set forth at the beginning of this Agreement or as subsequently changed by giving notice. Notices as to address changes, pricing changes, warranty changes and other matters relating to policy and business may be given by telex, telegram or first class mail. Notices by mail shall be deemed given three days after mailing.

18.4 Both Ricoh and Dealer shall act as principals in all respects concerning this Agreement and neither shall act or hold itself out as the agent, partner or joint venturer of the other, except to the extent that activities pursuant to the Major and Government Account Program may be deemed to constitute Ricoh or Dealer an agent of the other.

18.5 If any term or provision of this Agreement, or its application to any person or circumstances, shall be invalid or unenforceable, the remainder of this Agreement, or its application to any person or circumstances other than those as to which it is invalid or unenforceable, shall not

be affected, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

18.6 Dealer may not assign this Agreement or any of Dealer's rights under this Agreement, nor may Dealer delegate any of its duties under this Agreement.

This Agreement is dated as of the date first above written and shall become effective only upon execution by an authorized official of each of Dealer and Ricoh.

RICOH OF AMERICA, INC.

By /s/ JOHN E. STUART

Title General Manager

DEALER

Company The Stewart Organization, Inc.

By Walter H. Stewart

Title Chairman

SCHEDULE A

Dealer's Territory

Dealer's Territory is as described below:

Birmingham, AL.	Gadsden/Anniston	Tuscaloosa
Counties:	Counties:	Counties:
Jefferson	Cherokee	Tuscaloosa
Winston	Etowah	Sumter
Walker	Calhoun	Greene
Cullman	Cleburne	Hale
Blount	Clay	Bibb
Shelby	Talladega	Perry
Saint Clair		

SCHEDULE B

Dealer's Place of Business For Promotion and Display of Products

Dealer shall display products and promotional material made available by Ricoh at, and shall list as its address in connection with its advertising of Ricoh Products, only the locations designated below:

1210 S. 20th St.
Birmingham, AL. 35205

• • •

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1908 (5)

IN THE

Supreme Court Of The United States

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,

Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH-OF AMERICA, INC., a corporation,

Respondents

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

JOSEPH W. LETZER
F. A. FLOWERS, III*
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

*Counsel of Record

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

QUESTION PRESENTED

Does state law or federal law govern the enforceability of a forum-selection clause in a contract between two private parties, when the state in which suit is filed has a strong public policy against the enforcement of such contractual provisions?

INFORMATION REQUIRED BY RULE 28.1

The caption contains the names of all the parties to this action.

The Stewart Organization, Inc., one of the petitioners herein, is a corporation incorporated under the laws of the State of Alabama, and its principal place of business is in Birmingham, Alabama. The Stewart Organization, Inc. is not a subsidiary of any other company, and it has no subsidiaries.

Respondent, Ricoh Corporation, formerly known as Ricoh of America, Inc., is a corporation incorporated under the laws of the State of Delaware, and its principal place of business is in West Caldwell, New Jersey. At the time this action was filed, however, Ricoh Corporation was a corporation incorporated under the laws of the State of New York, rather than Delaware, and its principal place of business was in West Caldwell, New Jersey, as it is now.

Respondent, Ricoh Corporation, is a subsidiary of Ricoh Company, Ltd., a Japanese corporation. Respondent, Ricoh Corporation, also has two subsidiaries of its own, Ricoh Electronics, Inc., a California corporation, and Ricoh Corporation (Canada), Ltd., an Ontario corporation.

The subsidiary known as Ricoh Electronics, Inc. also has two subsidiaries, Ricoh Development of California, Inc., and Ricoh Thermal Systems, Inc. Both of these subsidiaries are California corporations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INFORMATION REQUIRED BY RULE 28.1	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. Proceedings in the District Court	3
B. Proceedings in the Court of Appeals	4
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. State Law, Rather Than Federal Law, Governs The Enforceability Of Contractual Forum-Selection Clauses In Diversity Cases.	9
A. Article III and the Judiciary Act of 1789.	9
B. Major Decisions of this Court.	10
C. The Policies Underlying Erie Require the Application of State Law in this Case.	17
D. The Decision By the Court Below Is Fatally Flawed for Four Additional Reasons.	21
E. Summary.	29
II. Alabama Law, Rather Than New York Law, Governs The Enforceability Of The Forum-Selection Clause At Issue.	30

TABLE OF CONTENTS – (Continued)

	Page
III. Even If Federal Law Governs The Enforceability Of The Forum-Selection Clause At Issue, The Clause Should Not Be Enforced Because To Do So Would Contravene A Strong Public Policy Of The Forum State, Alabama.	32
CONCLUSION	35

TABLE OF AUTHORITIES

Cases:	*Page(s)*
Angel v. Bullington, 330 U.S. 183 (1947)	14, 19
AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. ____, 106 S.Ct. 1415 (1986)	20
Baltimore & O. R. Co. v. Baugh, 149 U.S. 368 (1893)	11
Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1955)	19, 20
Blalock v. Perfect Subscription Co., 458 F. Supp. 123 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979)	31
Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 68 (S.D.N.Y. 1975)	31
Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958)	17
Callanan Industries, Inc. v. Sovereign Construction, Ltd., 44 A.D.2d 292, 354 N.Y.S. 2d 486 (1974)	32
Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)	27
Clarkco Contractors, Inc. v. Texas Eastern Gas Pipeline Co., 615 F. Supp. 775 (M.D. La. 1985)	33
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)	16
Conticommodity Services, Inc. v. TransAmerica Leasing, Inc., 473 So.2d 1053 (Ala. 1985)	17, 23, 32
Cutter v. Scott & Fetzer Co., 510 F. Supp. 905 (E.D. Wis. 1981)	34
D'Antuono v. CCH Computax Systems, Inc., 570 F. Supp. 708 (D. R.I. 1983)	34
Day & Zimmerman v. Challoner, 423 U.S. 3 (1975)	24, 25

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

ECC Computer Centers v. Entre Computer Centers, Inc., 597 F. Supp. 1182 (N.D. Ill. 1984) 34

Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938) ..... *passim*

First Nat. Life Ins. Co. v. Fidelity & Deposit Co. of Md., 525 F.2d 966 (5th Cir. 1976) 31, 32

Fricke v. Isbrandtsen Co., Inc., 151 F. Supp. 465 (S.D.N.Y. 1957) 31

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 14, 16, 19

Hanna v. Plumer, 380 U.S. 460 (1965) ..... *passim*

Home Ins. Co. v. Dick, 281 U.S. 397 (1930) 31

J. R. Watkins Co. v. Hill, 214 Ala. 507, 108 So. 244 (1926) 32

Keystone Leasing v. Peoples Protective Life Ins. Co., 514 F. Supp. 841 (E.D.N.Y. 1981) 31

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) ..... *passim*

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10

Matthews v. Swift & Co., 465 F.2d 814 (5th Cir. 1972) 31

Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 21, 22, 25

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) ..... *passim*

National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) 22, 23

Pines v. Warnaco, Inc., 706 F.2d 1173 (11th Cir. 1983) 31, 32

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Quick Erectors, Inc. v. Seattle Bronze Corp., 524 F. Supp. 351 (E.D. Mo. 1981) 34

Redwing Carriers, Inc. v. Foster, 382 So.2d 554 (Ala. 1980) 17, 23, 32

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 20

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 10, 24

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 25, 27

United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973) 26

Vance v. Campbell, 66 U.S. (1 Black) 427 (1861) 28

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 15, 16, 17, 22

United States Constitution:

U.S. Const. art. III 9, 29

Federal Statutes:

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 1292 (b) 4

28 U.S.C. § 1441 (b) 18

28 U.S.C. § 1652 ..... *passim*

28 U.S.C. § 2072 ..... 28, 29

Alabama Statutes:

Ala. Code § 6-3-1 (1975) 17

Treatises:

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System* 786 (2d ed. 1973) 29

TABLE OF AUTHORITIES – (Continued)

Treatises: *Page(s)*

C. Wright, *Law of Federal Courts* 1 (3d ed. 1976) 9, 10

4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075, p. 310 n.51 (1969) 23

Articles:

Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974) 15, 17

Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1 (1976) 20, 23, 26

Note, *Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?* 48 Fordham L. Rev. 568 (1980) 24, 32

Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1924) 25, 26

Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) 34

Other:

Restatement (Second) of Conflict of Laws § 187 (1971) 30, 31

No. 86-1908

IN THE

Supreme Court Of The United States

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,

Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,

Respondents

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The plurality, concurring, and dissenting opinions of the judges of the United States Court of Appeals for the Eleventh Circuit, sitting *en banc*, are reported in *The Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (*en banc*). The court's *en banc* opinions are reproduced in the Appendix to the Petition at pages 1-21.

The majority and dissenting opinions of the three-judge panel of the court of appeals which heard this case are re-

ported in *The Stewart Organization, Inc. v. Ricoh Corp.*, 779 F.2d 643 (11th Cir. 1986). The court's panel opinions are reproduced in the Appendix to the Petition at pages 23-41.

The order of the district court reviewed by the court of appeals is not reported, but is reproduced in the Appendix to the Petition at pages 42-43.

JURISDICTION

The judgment of the court of appeals was dated and entered on February 23, 1987. (Pet. App. 44-45). On May 22, 1987, petitioners timely filed a petition for a writ of certiorari, seeking review of the judgment of the court of appeals. On October 13, 1987, this Court granted the writ. (J.A. 3). The Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The statute involved in this case is section 34 of the Judiciary Act of 1789, 1 Stat. 92, as amended, 62 Stat. 944, which is presently codified at 28 U.S.C. § 1652. The statute reads as follows:

> 28 U.S.C. § 1652 State laws as rules of decision
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

The question presented by this case is whether state law or federal law governs the enforceability of a forum-selection clause in a contract between two private parties, when the state in which suit is filed (Alabama) has a strong public policy against the enforcement of such contractual provisions. The contract containing the forum-selection clause involved in this case was negotiated, executed, and wholly performed within the State of Alabama. (J.A. 4-7; 16; 42-45; 54-75; Stewart Deposition, pp. 10; 39-40; 44-46; 71).

A. Proceedings in the District Court.

Petitioners, who are all resident citizens of the State of Alabama, commenced this diversity action on September 28, 1984, by filing a complaint in the United States District Court for the Northern District of Alabama against the respondents, Ricoh of America, Inc., and its successor-in-interest, Ricoh Corporation ("respondents" or "Ricoh"). (J.A. 4-16). At the time the complaint was filed, Ricoh, which is presently a Delaware corporation, was a New York corporation.

In their complaint, petitioners sought damages from respondents for breach of contract, breach of warranty, fraud, and deceit. (J.A. 4-11). Petitioners also asserted a claim against respondents for violations of the antitrust laws. (J.A. 12-14).

In response to the complaint, respondents filed a motion to dismiss or transfer the action on the grounds of improper venue and *forum non conveniens*. (J.A. 17-19). Respondents' motion was predicated upon the forum-selection clause found under the heading "General Provisions" on page six of the standard-form contract entered into between Ricoh and The Stewart Organization:

> 18. *General Provisions*
>
> 18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith,

> shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this agreement and shall be a proper forum in which to adjudicate such case or controversy. (J.A. 18).

Following the submission of briefs and oral argument, the district court entered an order denying respondents' motion to dismiss or transfer on the basis of the forum-selection clause contained in the contract. (Pet. App. 42-43). The court held that Alabama law, rather than federal law, governed the enforceability of the forum-selection clause, and, moreover, that "Alabama clearly does not favor forum-selection clauses in contracts." (Pet. App. 43). The district court certified its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b), and the court of appeals accepted jurisdiction over the appeal on April 2, 1985. (J.A. 2; Pet. App. 25-26).

B. Proceedings in the Court of Appeals.

The panel hearing the appeal rendered its decision on January 10, 1986. *The Stewart Organization, Inc. v. Ricoh Corp.*, 779 F.2d 643 (11th Cir. 1986) (Pet. App. 23-41). Judge Johnson, writing for himself and Judge Tuttle, held as follows: (1) federal law governs the enforceability of forum-selection clauses in diversity actions because such clauses "present procedural questions" similar to those regarding venue; (2) under federal law, the forum-selection clause should be enforced; and (3) the clause governed all claims asserted in the complaint. (Pet. App. 32-36).

Chief Judge Godbold dissented from the panel decision, stating that "[t]he enforceability of contract provisions is

typically an issue of substance which a federal court sitting in diversity jurisdiction must decide according to state law." (Pet. App. 36-37). Moreover, he wrote, "the venue statutes do not express a wider federal interest that displaces state law in this area" because: (1) the venue statutes "do not address the question whether or under what circumstances a party will be deemed to have antecedently consented to proceed in one or another of the districts in which venue is properly laid"; and (2) "the venue statutes themselves leave important blanks to be filled in by reference to state law." (Pet. App. 40). Under "principles of federalism," Judge Godbold concluded, Alabama's policy of not enforcing contractual forum-selection clauses should be respected. (Pet. App. 41).

Following the panel's decision, The Stewart Organization filed a petition for rehearing *en banc*, which was granted on March 14, 1986. *The Stewart Organization, Inc. v. Ricoh Corp.*, 785 F.2d 896 (11th Cir. 1986) (Pet. App. 22). In its order granting rehearing *en banc*, the court also vacated the panel's decision. (*Id*).

The court of appeals, sitting *en banc*, rendered its decision in this case on February 23, 1987. *The Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (Pet. App. 1-21). A plurality of five judges, out of thirteen judges hearing the case, framed the issue as whether a "contractual 'choice of forum clause' is enforceable in diversity actions in federal court when the forum state considers such clauses to be violative of state public policy." (Pet. App. 2). Adopting the panel's reasoning that forum-selection clauses "present procedural questions" similar to those regarding venue, and using as a guide this Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965), the plurality held that "forum-selection clauses present procedural questions to be resolved by federal law independent of fo-

rum state policy." (Pet. App. 2). The plurality also held that, under federal law, the forum-selection clause at issue should be enforced and that the clause governed all claims asserted in the complaint. (Pet. App. 6-9).

Three judges concurred in the court's judgment reversing the district court, but for different reasons. (Pet. App. 9-19). In their view, the district court should have given effect to the forum-selection clause and transferred the case to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1404 (a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." (*Id*). To do otherwise, Judge Tjoflat wrote, would have been an abuse of discretion. (Pet. App. 9).

Judge Godbold, joined by four other judges, dissented from the court's judgment. (Pet. App. 19-21). In addition to the reasons set forth in his dissent from the panel's decision, Judge Godbold also dissented on the ground that, because there is no provision in any federal statute, including the venue statutes, addressing the enforceability of contractual forum-selection clauses, the court must use rules drawn from state law. (Pet. App. 20-21). "As a result of the en banc decision," Judge Godbold concluded, "the state courts will go in one direction and the federal another, which takes litigants back to the kinds of forum shopping described in my dissent and deplored in *Erie*." (Pet. App. 21). This Court granted the writ on October 13, 1987. (J.A. 3).

SUMMARY OF THE ARGUMENT

State law, rather than federal law, governs the enforceability of contractual forum-selection clauses in diversity

cases. Indeed, in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court expressly held that the federal courts, absent a constitutionally sound grant of authority by Congress, do not have the authority or power to develop federal law when faced with issues involving "purely commercial law" and "obligations under contracts entered into and to be performed within the state." 304 U.S. at 75. These issues are governed by state law because there can be no other law to apply.

The decision by the court below is also in direct conflict with the "twin aims" of *Erie*. It will lead to forum-shopping and to the inequitable administration of the laws in coordinate state and federal courts sitting side by side. Consequently, the court's judgment must be reversed.

In addition to being in direct conflict with the "twin aims" of *Erie*, the decision by the court below is fatally flawed for four additional reasons, all four of which require reversal.

1. First, there is no constitutional provision or federal statute, including the venue statutes, directly addressing the enforceability of forum-selection clauses. We are simply not confronted with any conflict between a federal law and Alabama's laws and policy against the enforcement of contractual forum-selection clauses. Both the federal venue statutes and Alabama's laws and policy against forum-selection clauses can exist side by side, each controlling its own intended sphere of coverage without conflict. The court below was wrong in concluding otherwise.

2. The second fatal flaw in the decision by the court below is that the enforceability of forum-selection clauses involves questions of "common law." The court below, however, created a federal policy in favor of forum-selection clauses out of whole-cloth and imposed it over an actual

state interest derived from the common law. The Eleventh Circuit's creation of wholly judge-made law in favor of forum-selection clauses, an obligation under a contract, is in direct conflict with *Erie* and its progeny. Consequently, the court's judgment must be reversed.

3. The antitrust aspects of this case do not alter the conclusion that state law, rather than federal law, governs the enforceability of the forum-selection clause at issue. The Rules of Decision Act and *Erie* apply in federal question cases, when appropriate, as well as in diversity cases. Indeed, the Court has applied the Rules of Decision Act in antitrust cases, as well as in other federal question cases. The same result is required here.

4. Finally, the decisions of this Court clearly demonstrate that the boundaries surrounding the power of the federal courts to make law cannot be plotted by any classification of rules as "substantive" or "procedural." Instead, careful attention must be given to the policies underlying the *Erie* doctrine. However, even if it is assumed that the enforcement of a forum-selection clause involves a "procedural" question, which it does not, the issue is still a matter for Congress, or possibly this Court under the Rules Enabling Act, not the federal courts of appeals. For this final reason, the judgment of the court below must be reversed.

Alabama law, rather than New York law, governs the enforceability of the forum-selection clause at issue, notwithstanding the fact that the contract entered into between Ricoh and The Stewart Organization designates New York law as the governing law. To apply New York law in this case would result in enforcement of the forum-selection clause at issue in direct conflict with the strong public policy of Alabama, the state whose law would otherwise apply. The Alabama courts, the court below, and the courts of New York have consistently refused to sanction such a result.

Accordingly, Alabama law, rather than New York law, governs the enforceability of the forum-selection clause at issue.

Finally, even if it is assumed that federal law governs the enforceability of the forum-selection clause at issue in this case, which it does not, the clause should not be enforced because to do so would contravene a strong public policy of the forum state, Alabama. This result is required by the Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

For the foregoing reasons, the Court should reverse the judgment of the court below, and remand the case to the court of appeals with directions to enter a judgment affirming the order of the district court entered herein on January 29, 1985.

ARGUMENT

I. State Law, Rather Than Federal Law, Governs The Enforceability Of Contractual Forum-Selection Clauses In Diversity Cases.

A. *Article III and the Judiciary Act of 1789.*

The issue presented for resolution in this case raises vastly important questions regarding the proper distribution of power between the state and federal courts. Of course, any discussion of the relationship between the state and federal courts necessarily must begin with two 18th century landmarks – Article III of the Constitution and the Judiciary Act of 1789. While there have been many changes since then, indeed important changes, this case demonstrates that "decisions made at the very beginning of the republic as to the nature of the federal judicial system have a marked imprint on even the most routine case to this day." C. Wright, *Law of Federal Courts* 1 (3d ed. 1976).

The necessity for resort to Article III of the Constitution in understanding the federal judicial system is obvious; the

federal courts can neither be given nor exercise authority beyond the authority conferred by the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The other great 18th century landmark, the Judiciary Act of 1789 — or the First Judiciary Act as it is often called — has acquired a status almost as exalted as the Constitution itself. Wright, *supra*, at 3. Section 34 of the Act is well known as the Rules of Decision Act, which presently reads as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U.S.C. § 1652.

From its basic instruction to the federal courts to use state law to decide cases, the First Congress, in the Rules of Decision Act, made an exception for questions (or entire disputes) for which the Constitution, a treaty or a federal statute supplies a rule for the federal courts to use. The plan of the Act is clear: where no provision in the Constitution, a treaty, or a federal statute governs, the federal courts must use rules drawn from state law.

B. *Major Decisions of this Court.*

The lower federal courts have experienced great difficulty in deciding cases involving the Rules of Decision Act. After a brief discussion of the major decisions of this Court interpreting the Act, however, the proper analysis, as well as the proper result in this case, becomes quite clear.

In *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), a commercial dispute, the precise issue was whether a pre-existing debt was good consideration for an endorsement of a bill of exchange so that the endorsee would be a holder in due

course. Several decisions of this Court regarded a pre-existing debt as good consideration, but the New York decisions were unclear. Justice Story, writing for the Court, assumed that the New York courts, based on their decisions, would not regard a pre-existing debt as good consideration, but concluded that an opposite result should be reached by a federal court sitting in a diversity case. Concluding that the New York decisions were not "laws" of the state within the meaning of the Rules of Decision Act, Justice Story opined that "[i]n the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws." 16 Pet. at 18.

Justice Story went further, however. He went on to distinguish between, on the one hand, matters of "local law," including state statutes and their construction, and decisions as to real estate, and, on the other hand, questions of "general law," dependent not on "the decisions of the local tribunals," but on "the general principles and doctrines of commercial jurisprudence." 16 Pet. at 19.

After the Court handed down its decision in *Swift v. Tyson*, the federal courts experienced great difficulty in distinguishing between matters of "general law," which the federal courts were free to find for themselves, and matters of "local law," on which state court decisions were binding on the federal courts. Wright, *supra*, at 250. Nor was *Swift v. Tyson* limited to questions of commercial law; this Court ultimately held that federal courts were free to decide for themselves questions regarding the law of torts. *Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368 (1893).

The *Swift* doctrine was widely criticized by both the courts and the commentators, but did not meet its death until 1938, when, on April 25, 1938, this Court rendered its decision in *Erie R. R. Co. v. Tompkins*, 304 U.S. 64

(1938). In *Erie*, Justice Brandeis, writing for the Court, framed the issue as "whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved." 304 U.S. at 69. Under the *Swift* doctrine, Justice Brandeis noted, "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court," and, in addition, "the doctrine had prevented uniformity in the administration of the law of the state." 304 U.S. at 74-75.

Justice Brandeis included within the definition of "general law" questions regarding *"purely commercial law"* and *"obligations under contracts entered into and to be performed within the state."* 304 U.S. at 75 (emphasis added). In interpreting the Rules of Decision Act, the Court overruled *Swift v. Tyson*, holding as follows:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in *any* case is the law of the state. And whether the law of the state shall be declared by its Legislature in a *statute* or by its highest court in a *decision* is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of *common law* applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. 304 U.S. at 78 (emphasis added).

Justice Harlan later declared that "*Erie* was something more than an opinion which worried about 'forum-shopping and avoidance of inequitable administration of the laws,' although to be sure these were important elements of the decision." The Court's decision in *Erie*, Justice Harlan observed, is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the

allocation of judicial power between the state and federal systems." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

In *Erie*, the Court did not indicate, in any way, that notions of "substance" and "procedure" were the keys to interpreting the Rules of Decision Act. While the Court did state that "Congress has no power to declare substantive rules of common law applicable in a state," 304 U.S. at 78, this was by way of demonstrating the unconstitutionality of excluding the entire species "general common law" from the coverage of the Rules of Decision Act, and not by way of suggesting a test for deciding which state rules were "rules of decision." This is the majority opinion's only use of the word "substantive"; the word "procedural" does not appear in the opinion. Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 708 n.81 (1974).

Three years after *Erie*, the Court rendered its decision in another diversity case, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). The Court held that the choice-of-law rules of the state in which the federal court sits are binding on the federal courts, even at the expense of inconsistency within the federal court system as a whole. Reasoning that the "accident of diversity" should not disturb the "equal administration of justice in coordinate state and federal courts sitting side by side," the Court concluded that "[a]ny other ruling would do violence to the principle of uniformity *within a state* upon which the *Tompkins* decision is based." 313 U.S. at 496 (emphasis added). Consequently, the Court wrote, "whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue *local policies* diverging from those of its neighbors." *Id.* (emphasis added). *See also*

Angel v. Bullington, 330 U.S. 183, 191 (1947) ("The essence of diversity jurisdiction is that a federal court enforces State law and State policy").

Indeed, "[t]he operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945) (federal courts are required, under the Rules of Decision Act, to follow state "procedural" law that is "outcome-determinative").

We now turn to the principal decision relied upon by the court below, *Hanna v. Plumer*, 380 U.S. 460 (1965). In *Hanna*, the Court held that in a civil action based upon diversity of citizenship, Rule 4 (d) (1) of the Federal Rules of Civil Procedure, rather than state law, governed the manner in which process was served. Massachusetts law required in-hand service on an executor or administrator of an estate, whereas Rule 4 permitted service by leaving copies of the summons and complaint at the defendant's home with a person "of suitable age and discretion." In the absence of a conflicting state procedure, the Court noted, the Federal Rule would clearly control. 380 U.S. at 465.

The Court further explained that the "outcome-determinative" test of *York*, *supra*, had to be read with reference to the "twin aims" of Erie: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468. The Court in *Hanna* found that neither of these two policies would be transgressed if the federal procedural rule was applied. The choice between the state in-hand service rule and the Federal Rule "would be of scant, if any, relevance to the choice of a forum" because "adherence to the state rule would have resulted only in altering the way in which process was served." *Id.* at 469. In addition, permitting service on defendant's wife instead of in-hand service on the defendant himself would not involve any significant inequitable administration of the law. *Id.* Hence, the Federal Rule governed.

The Court in *Hanna*, however, pointed out "a more fundamental flaw" in the defendant's argument. 380 U.S. at 469. The Court concluded that the *Erie* doctrine simply was not the appropriate test of the validity and applicability of one of the Federal Rules of Civil Procedure. 380 U.S. at 470. Where one of the Federal Rules is involved, the Court explained, the test is whether the Rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, rather than the Rules of Decision Act, the statute involved in *Erie* and this case, and, if so, within a constitutional grant of power such as the Necessary and Proper Clause of Article I. 380 U.S. at 470-72.

In fact, as the Court recognized in *Hanna*, "the line of cases following *Erie* diverged markedly from the line construing the Enabling Act." 380 U.S. at 465. "Nor has the development of [these] two separate lines of cases been inadvertent." The Enabling Act rule, on the one hand, and the *Erie* rule, on the other hand, "were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice. . . ." 380 U.S. at 471.

Moreover, "specific limitations" were placed on the *Hanna* analysis — "[a]pplication of the *Hanna* analysis is premised on a 'direct collision' between the Federal Rule and the state law." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980), *quoting*, *Hanna*, 380 U.S. at 472. The "*Hanna* analysis applies" only if there is an "unavoidable"

clash between the Federal Rule and the state law. 446 U.S. at 749-50.[1]

After noting, as it did in *York, supra,* that Erie-type problems are "not to be solved by reference to any traditional or common-sense substance-procedure distinction," 380 U.S. at 465-66, the Court in *Hanna* then discussed the question of what law would have governed the purely procedural question before it if no Federal Rule was involved and a true *Erie* problem had been presented:

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas *state law must govern because there can be no other law.* 380 U.S. at 471-72 (emphasis added).

See also Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) ("Even if we were to agree that the New Jersey statute is procedural, it would not determine that it is not applicable").

Finally, while it is unclear to what extent, if any, the rigid "outcome-determinative" test enunciated in *York, supra,* remains viable, the Court in *Hanna* expressly recognized that the *York* analysis was not all-inclusive and "was never intended to serve as a talisman" to be ritualistically applied the same way in all cases. 380 U.S. at 466-67. Indeed, "the message of *York* itself is that choices between

[1]In *Walker*, the Court held that Oklahoma's service-of-process statute applied in diversity cases, despite Rule 3 of the Federal Rules of Civil Procedure, which provides that an action is commenced by the filing of a complaint with the district court. "Since there is no direct conflict between the Federal Rule and the state law," the Court in *Walker* held, "the *Hanna* analysis does not apply. Instead, the policies behind *Erie* . . . control the issue. . . ." 446 U.S. at 752.

state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." *Hanna*, 380 U.S. at 467. *See also Walker, supra.*[2]

C. *The Policies Underlying Erie Require the Application of State Law in this Case.*

In this case, unlike *Hanna, supra,* the relevant statute is the Rules of Decision Act, not the Rules Enabling Act. This is true because there is no "unavoidable" clash (in fact there is no clash at all) between any constitutional provision or federal statute or rule and Alabama's strong public policy against forum-selection clauses. *See, e.g., Redwing Carriers, Inc. v. Foster*, 382 So.2d 554, 556 (Ala. 1980) (contractual forum-selection clauses do "not govern venue" and are "invalid and unenforceable as being contrary to public policy"); *Conticommodity Services, Inc. v. TransAmerica Leasing, Inc.*, 473 So.2d 1053 (Ala. 1985) (*Redwing Carriers* reaffirmed). *See also* Ala. Code § 6-3-1 (1975) (forum-selection clauses "void") (codified in venue section of Code). Thus, under the express language of *Hanna*, and the Court's subsequent decision in *Walker*, the *Hanna* analysis under the Rules Enabling Act simply does not apply.

Instead, what is required is an analysis under the "twin aims" of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws. While state law should be applied if *either* one of these policies is transgressed, *Walker*, 446 U.S. at 753, in this case, the application of federal law, which the court below applied, would transgress *both* policies underlying *Erie*.

[2]The Court's earlier "balancing test" employed in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), was apparently abandoned in footnote 9 of *Hanna*. Ely, *supra*, at 717 n.180.

Applying a wholly judge-made federal rule in favor of forum-selection clauses, as the court below did in this case, will create an incentive for out-of-state plaintiffs to shop between state court and the local federal court. If an out-of-state plaintiff found the courts of Alabama, for example, more to its liking (for any number of reasons) than the courts of the chosen forum, it could file suit in an Alabama *state* court, which would not enforce the forum-selection clause, even though the federal district courts were established, in part, for the benefit of non-residents. The "one-way" nature of the federal removal statute, 28 U.S.C. § 1441 (b), would preclude an Alabama defendant from removing the action to the local federal district court, which, under the decision by the court below, would enforce the forum-selection clause and transfer the action to the chosen forum. This is precisely the sort of forum-shopping deplored by the Court in *Erie* – the unfairness of affording an out-of-state plaintiff suing a resident defendant a unilateral choice of the rules by which the lawsuit is to be governed. 304 U.S. at 74-76.

With respect to the second policy underlying the *Erie* doctrine – the avoidance of inequitable administration of the laws – recognition of the rule created by the court below would unquestionably lead to the inequitable administration of the law in coordinate state and federal courts sitting side by side. The enforceability of a forum-selection clause should not depend on whether the plaintiff happens to commence an action in a state court, or, on the basis of diversity jurisdiction, in a federal court. If a state court, such as an Alabama court, would not enforce a forum-selection clause and would retain jurisdiction over a case, why should a federal court sitting in diversity only three blocks away reach a different result, *i.e.*, dismiss the action or transfer it to another forum? The answer, of course, is that a federal court should not do so because, for purposes of

diversity jurisdiction, "a federal court is in effect, only another court of the State." *Angel v. Bullington*, 330 U.S. 183, 187 (1947), *quoting*, *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

In short, it simply makes no sense for a right to be recognized in a state court sitting in Birmingham, Alabama, but not recognized in a federal court sitting in diversity only three blocks away. "Congress afforded out-of-state litigants another tribunal, not another body of law." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945). *See also Klaxon*, *supra* ("the accident of diversity" should not disturb the "equal administration of justice in coordinate state and federal courts sitting side by side," even at the expense of inconsistency within the federal court system as a whole).

The frustration by the court below of this second policy underlying the *Erie* doctrine – the avoidance of inequitable administration of the laws – can be illustrated by this Court's decision in *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1955). In *Bernhardt*, plaintiff brought suit in a Vermont state court, seeking damages for breach of an employment contract. The contract required any dispute between the parties to be submitted to arbitration under New York law. 350 U.S. at 199.

The defendant removed the case to federal district court based on the diversity of citizenship between the parties. Thereafter, the district court denied the defendant's motion to stay the proceedings pending arbitration, holding that, under *Erie*, the arbitration provision in the contract was governed by Vermont law, which made revocable an agreement to arbitrate at any time befote an award is actually made. *Id.* The Second Circuit reversed, and this Court granted certiorari.

The Court held that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, was not applicable to the case because

the transaction at issue did not involve a maritime transaction or interstate or foreign commerce. 350 U.S. at 201-02. Accordingly, whether the contractual provision for arbitration would be enforceable in a diversity action, the Court held, depended on state law. In reaching its holding, the Court relied, in part, on the "outcome-determinative" test enunciated in *York, supra*. The Court also based its decision upon *Erie* itself: "[T]here would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be." 350 U.S. at 204. *See generally AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. ____, ____, 106 S.Ct. 1415, 1418 (1986) ("arbitration is a matter of contract").

A court asked to dismiss or transfer a case because of a forum-selection clause in a contract between two parties is faced with the same conceptual question as is a court which is asked to stay proceedings pending arbitration pursuant to an agreement by the parties. In each case, the court is asked, in effect, to decline to exercise jurisdiction it is given by law in order to uphold a private agreement between the parties. *See generally* Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1, 14-15 (1976). Indeed, as this Court observed in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause."[3]

[3]In *Scherk*, the Court held that an arbitration clause in an international agreement between an American company and a German citizen was enforceable under the Federal Arbitration Act. The Court did not overrule its earlier decision in *Bernhardt*, and, moreover, explicitly limited its approval of *The Bremen* rule to clauses implicating the Arbitration Act. 417 U.S. at 518-20. Thus, the Court has used a federal standard only where the Constitution or Congress has given the federal courts broad and extensive power to create law in a particular field. *Scherk* (Arbitration Act); *The Bremen* (admiralty, an area of law in which the federal courts have acted as the primary agent in developing the law). This is not such a case.

In this case, because state law would clearly govern the question whether the contractual forum-selection clause at issue is enforceable if petitioners had sued a co-citizen in a state court, the "accident of diversity" should not dictate a different result simply because petitioners sued a citizen of a different state in a federal court sitting only three blocks away. "Any other ruling would do violence to the principle of uniformity *within a state* upon which the *Tompkins* decision is based." *Klaxon, supra* (emphasis added).

In sum, the decision by the court below is in direct conflict with the "twin aims" of *Erie*. It will lead to forum-shopping and to the inequitable administration of the laws in coordinate state and federal courts sitting side by side. Consequently, the court's judgment must be reversed.

D. *The Decision By the Court Below Is Fatally Flawed for Four Additional Reasons.*

In addition to being in direct conflict with the "twin aims" of *Erie*, the decision by the court below is fatally flawed for four additional reasons, all four of which require reversal.

1. First, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises first must be specifically shown" before the federal courts may properly fashion a body of federal common law in an area. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31-32 (1977), *quoting*, *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).[4] In this case, there is no constitutional provision or federal stat-

[4]In *Miree*, the Court found "the fact that the United States has a *substantial* interest in regulating aircraft travel and promoting air travel safety" was not sufficient to justify displacing state law. 433 U.S. at 31 (emphasis added).

ute, including the venue statutes, directly addressing the enforceability of forum-selection clauses. We are simply not confronted with *any* conflict between a federal law and Alabama's laws and policy against the enforcement of contractual forum-selection clauses.

Contrary to the plurality opinion by the court below, the scope of the federal venue statutes is not "sufficiently broad" to cause a "direct collision" with the state law involved, thereby leaving no room for the operation of Alabama's policy against forum-selection clauses. *Walker, supra*. Both the federal venue statutes and Alabama's laws and policy against forum-selection clauses can exist side by side, "each controlling its own intended sphere of coverage without conflict." *Id*. The court below was wrong in concluding otherwise.

Similarly, Congress has not expressed a policy regarding forum-selection clauses, in the venue statutes or otherwise (agreeing to a particular forum in a contract *before* suit is filed is not the same thing as waiving venue *after* suit is filed). If it were to do so, pursuant to the commerce clause, for example, Congress would have at least three choices: (1) adopt a policy in favor of forum-selection clauses; (2) adopt a policy against forum-selection clauses; or (3) leave the issue to the states. Thus, "any federal interest in the outcome of the question before us 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" *Miree*, 433 U.S. at 32-33, *quoting, Bank of America Nat. Trust & Savings Ass'n v. Parnell*, 352 U.S. 29, 33-34 (1956). Until Congress acts, therefore, "state law must govern because there can be no other law" to apply. *Hanna v. Plumer, supra*.[8]

[8]The court below also erred by relying on this Court's decision in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). In *Szukhent*, "[t]he only question now before us," the Court stated, "is whether a

2. The second fatal flaw in the decision by the court below is that the enforceability of forum-selection clauses involves questions of "common law."

The right to have one's disputes resolved locally is as ancient as the Magna Charta cc. 17-19. In Alabama, contractual forum-selection clauses are "invalid and unenforceable as being contrary to public policy." *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554, 556 (Ala. 1980). Alabama's strong public policy against forum-selection clauses, as expressed in *Redwing Carriers, supra*, and expressly reaffirmed, when asked to change its position, by the court in *Conticommodity Services, Inc. v. TransAmerica Leasing, Inc.*, 473 So.2d 1053 (Ala. 1985), is an adoption of the traditional *common law* rule.

The "*common law* approach . . . was that parties to a *contract* could not 'oust' or prevent a court from taking jurisdiction, and *agreements* purporting to do so were void. . . . The traditional view of the American courts was the *common law* approach; the courts would refuse to give effect to an *agreement* in derogation of the exercise of its jurisdiction." Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1, 8 & 12 (1976) (emphasis added). *See also M/S Bremen v. Zapata*

person upon whom the summons and complaint were served was 'an agent authorized by appointment' [within the meaning of Rule 4(d), Fed.R.Civ. P.] to receive the same, so as to subject the respondents to the jurisdiction of the federal court in New York." 375 U.S. at 313. While Justice Stewart in *Szukhent* did note in passing that the appointment-of-agent clause in the contract involved was intended to constitute submission to personal jurisdiction in New York, and noted that such agreements had been regularly upheld, the Court did *not* decide whether the validity and effect of the clause was governed by federal law, rather than state law. 375 U.S. at 315-16; 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075, p. 310 n.51 (1969). In *Szukhent*, the Court held as follows: "We hold only that, prompt notice to the respondents having been given, Florence Weinberg was their 'agent authorized by appointment' to receive process within the meaning of Federal Rule of Civil Procedure 4(d)(1)." 375 U.S. at 318.

Off-Shore Co., 407 U.S. 1, 10-13 (1972) (contract analysis even though "ouster" rationale and "contrary to public policy" rationale recognized and criticized: enforcement of forum-selection clauses "accords with ancient concepts of freedom of contract").[8]

Furthermore, "[t]he traditional view reflected judicial reluctance to allow individuals to be precluded from their substantial right of access to all competent courts." Note, *Choice of Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted?* 48 Fordham L. Rev. 568, 568 (1980). In this case, therefore, we are dealing with a state-created right derived from the common law — the right of Alabama citizens to resolve their disputes with others in Alabama.

Whether the rationale of the common law approach is in vogue is irrelevant. The effect of the common law approach and Alabama's policy is that Alabama's citizens are guaranteed a local forum in which to resolve their disputes, regardless of a contractual provision to the contrary. Alabama has "the right to pursue local policies diverging from those of its neighbors, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and "a federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmerman v. Challoner*, 423 U.S. 3, 4 (1975) (*Klaxon* reaffirmed). To hold otherwise would simply be a return to the overthrown doctrine of *Swift v. Tyson*.

The court below, however, created a federal policy in favor of forum-selection clauses out of whole-cloth and imposed it over an actual state interest derived from the common law. The Eleventh Circuit's creation of wholly judge-made law in favor of forum-selection clauses, an obligation under a contract, is in direct conflict with *Erie*, *Klaxon* and *Day & Zimmerman, supra*. The decision by the court below is also in direct conflict with the principle, first enunciated in *Erie*, that "the vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). The question whether "latent federal power should be exercised to displace state law is primarily a decision for Congress." *Miree, supra*.

Finally, the legislative history of the Rules of Decision Act, as set out in Professor Charles Warren's historic article and accepted by the Court in *Erie*, 304 U.S. at 72-73 & n.5, establishes that the original draft of what ultimately became § 34 of the First Judiciary Act was in the handwriting of Senator Oliver Ellsworth of Connecticut, and expressly provided that a State's "unwritten or common law," as well as its statutes, would operate as rules of decision for the federal courts to use in cases for which no federal constitutional, statutory or treaty provision itself provided the rule of decision. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 85-88 (1924). Because Ellsworth and four other members of the committee appointed to draft the First Judiciary Act had also served in the Constitutional Convention, they were familiar with the Constitution's intent as to the Judiciary. *Id.* at 57.

The inference to be drawn from both Professor Warren's research, and this Court's acceptance of it in *Erie*, is that Ellsworth and the First Congress understood that when they

[8] *The Bremen* did not address the question whether state law or federal law governed the enforceability of forum-selection clauses in non-admiralty cases brought in the federal courts.

made reference to the "laws" of the several states, that reference included the common law of the states unless otherwise provided.[7] Of course, much of the law of contracts in this country, including the traditional approach to forum-selection clauses, has been and continues to be shaped by the common law and announced by the state courts. Gilbert, *supra*.

Erie also recognized that the Framers of the First Judiciary Act, in their use of the word "law" or "laws," were supremely conscious of the lawmaking powers of the several states as those powers had been, and would be, exercised by the state court systems. When *Erie* is understood in this context, the decision by the court below obviously violates the principles of federalism lying at the core of our Constitution.

3. The antitrust aspects of this case do not alter the conclusion that state law governs the enforceability of the forum-selection clause at issue. The Rules of Decision Act and *Erie* apply in federal question cases, when appropriate, as well as in diversity cases. *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 591 (1973). Indeed, "[t]his principle follows from *Erie* itself, where . . . we held that the federal courts did not possess the power to develop a concomitant body of general federal law." *Id.* *See generally Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in *any* case is the law of the state") (emphasis added).[8]

[7]In a subsequent draft, Ellsworth transformed the terms "Statute law" and "unwritten or common law" into a unitary concept – the "laws of the several states" – because in Ellsworth's era, as well as today, the term "laws of the several states" was understood as comprehending the common law of each State. 37 Harv. L. Rev. at 86.

[8]The court below treated this case primarily as a diversity case, as evidenced by its framing of the issue: "This case was taken *en banc* to consider whether a freely negotiated contractual 'choice of forum clause' is enforceable in diversity actions in federal court when the forum state considers such clauses to be violative of state public policy." (Pet. App. 2).

This principle can be illustrated by the Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), an antitrust action falling within the exclusive jurisdiction of the federal courts. In *Texas Industries*, the precise issue was whether a defendant could seek contribution from other participants in an unlawful conspiracy, which the common law did not provide. The Fifth Circuit had held that although neither the Sherman Act nor the Clayton Act affords a right to contribution, the issue should be resolved as a matter of federal common law under the *Clearfield Trust* doctrine. 451 U.S. at 633.

This Court was urged to follow the trend in the law away from the common law rule (which respondents ask the Court to do in this case) by adopting a right to contribution for antitrust violators under federal common law. The Court refused to do so, even though it recognized that the right to contribution might further the purpose of the antitrust laws. The Court held that, because neither the Sherman Act nor the Clayton Act confers upon the federal courts the broad power to formulate a right to contribution in antitrust cases, the issue was a matter for Congress, not the courts, to resolve as a matter of policy: "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts." 451 U.S. at 640-41.

The Court has reached similar results in other antitrust and federal question cases, relying expressly upon the Rules of Decision Act. *See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (Prior to

the enactment of the antitrust statute of limitations contained in § 4(b) of the Clayton Act, 15 U.S.C. § 15(b), the applicable limitations period was held to be a matter of state law under the Rules of Decision Act); *Vance v. Campbell*, 66 U.S. (1 Black) 427 (1861) (state law governing competency of witnesses applied in patent infringement case under Rules of Decision Act when no federal law otherwise required or provided). The same result is required here.

4. Finally, the decisions of this Court clearly demonstrate that the boundaries surrounding the power of the federal courts to make law cannot be plotted by any classification of rules as "substantive" or "procedural." Instead, careful attention must be given to the policies underlying the *Erie* doctrine. However, even if it is assumed that the enforcement of a forum-selection clause involves a "procedural" question, which it clearly does not, the issue is still a matter for Congress, or possibly this Court under the Rules Enabling Act, 28 U.S.C. § 2072, not the federal courts of appeals. As the Court stated in *Hanna v. Plumer*, *supra*:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it *congressional* power to make rules governing the practice and pleadings in those courts.
>
> • • •
>
> Erie and its offspring cast no doubt on the long-recognized power of *Congress* to prescribe housekeeping rules for federal courts. 380 U.S. at 472 & 473 (emphasis added).

See generally Erie, 304 U.S. 64, 92 (Reed, J., concurring) ("[N]o one doubts federal power over procedure. The Judiciary Article, 3, and the 'necessary and proper' clause of Article 1, § 8, may fully authorize legislation, such as this section of the Judiciary Act").

This principle enunciated in *Hanna* is consistent with, if not compelled by, our constitutional form of government. American constitutions, both state and federal, place the power over the nature and structure of the judicial process largely in the legislative bodies. *See, e.g.*, U.S. Const. art. III, §§ 1, 2. As a result, rulemaking by courts in both the state and federal systems generally requires legislative authorization, and the product of judicial rulemaking generally requires legislative review and revision. *See, e.g.*, 28 U.S.C. § 2072 (authority of Supreme Court to prescribe rules of civil procedure, to take effect after they "have been reported to Congress. . . ."). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and The Federal System* 786 (2d ed. 1973).

To allow a federal court of appeals to fashion a rule in favor of forum-selection clauses without congressional authorization, even if the rule is deemed a "procedural" one, as the court below did, is inconsistent with *Hanna* and its underpinnings. In addition, a federal court has no more authority to reject state "procedure" it deems unjust than it has to reject state "substantive" law for the same reason: its function is not to sit in judgment on the wisdom of state rules and reject those it believes unjust. Again, to hold otherwise, under the theoretical guise of protecting an interest in uniformity among the federal courts, would simply be a return to the overthrown doctrine of *Swift v. Tyson*. For this final reason, the judgment of the court below must be reversed.

E. *Summary.*

To summarize, the plan of the Rules of Decision Act is clear: where no specifically controlling provision in the Constitution or a federal statute governs an issue, the federal courts are required to apply rules drawn from state law.

Indeed, this is precisely what the Court held in *Erie* when it quite simply stated: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state." 304 U.S. at 78.

In this case, no federal law governs the issue; the Rules of Decision Act is the relevant statute; and under the Rules of Decision Act, the court below was required to apply state law. It failed to do so. Consequently, its judgment must be reversed.

II. Alabama Law, Rather Than New York Law, Governs The Enforceability Of The Forum-Selection Clause At Issue.

Having demonstrated that the forum-selection clause in the contract entered into between Ricoh and The Stewart Organization is governed by state law, the question now becomes *which* state law is to be applied, Alabama law or New York law? Respondents have simply assumed throughout this case that New York law applies because of the choice-of-law provision in the contract designating New York law; nothing could be further from the truth.

Fulfillment of the parties' expectations is not the only value in contract law:

> Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for the state interests and state regulation. The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties.

Restatement (Second) of Conflict of Laws § 187, Comment g, p. 567 (1971).

Based on the foregoing considerations, the general rule is that the state law chosen should not be applied if

"application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties." *Id.* at § 187 (2) (b). This rule is not only the law of Alabama and the Eleventh Circuit; it is also the law of New York.[9]

With respect to this case, it is well settled that, absent the choice-of-law provision in the contract, the Alabama courts, and under *Klaxon, supra,* the federal courts in Alabama, would apply "the law of the state wherein the contract is executed," *Pines v. Warnaco, Inc.*, 706 F.2d 1173, 1176 (11th Cir. 1983), or the law of the state "where the contract is to be performed," if the place of performance is other than where the contract was made. *First Nat. Life Ins. Co. v. Fidelity & Deposit Co. of Md.*, 525 F.2d 966, 967

[9] *See, e.g., Blalock v. Perfect Subscription Co.*, 458 F. Supp. 123, 127 (S.D. Ala. 1978), *aff'd*, 599 F.2d 743 (5th Cir. 1979) (although contract provided for the application of Pennsylvania law to a covenant-not-to-compete, Pennsylvania law was not applied because to do so would have resulted in enforcement of the covenant in direct conflict with the public policy of Alabama); *Matthews v. Swift & Co.*, 465 F.2d 814, 818 (5th Cir. 1972) (New York law should not be applied if to do so would result in a conflict with the public policy of Alabama); *Keystone Leasing v. Peoples Protective Life Ins. Co.*, 514 F. Supp. 841, 847-48 (E.D.N.Y. 1981) (even though contract designated New York law, Tennessee law was applied because Tennessee was the site of the most significant contacts, and fundamental policies of Tennessee were involved); *Business Incentives Co. v. Sony Corp. of America*, 397 F. Supp. 63, 67 (S.D.N.Y. 1975) (despite the parties' agreement to apply New York law, where defendant was a New Jersey corporation, where performance of the contract was contemplated exclusively in New Jersey, and where New Jersey had a strong policy against unfair bargaining advantage, New Jersey, rather than New York, law was applied); *Fricke v. Isbrandtsen Co., Inc.*, 151 F. Supp. 465 (S.D.N.Y. 1957) (summary judgment for the defendant denied because of the possibility that application of the chosen law might be contrary to the policy of the state whose law would otherwise apply). *Cf. Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930) (application of Texas law to a transaction with which Texas had no factual contacts violated due process).

(5th Cir. 1976). *See generally J. R. Watkins Co. v. Hill,* 214 Ala. 507, 108 So. 244 (1926). It is undisputed in this case that the contract made the basis of this suit was negotiated, executed, contemplated to be performed, and was actually performed wholly within the State of Alabama. (J.A. 4-7; 16; 42-45; 54-75; Stewart Deposition, pp. 10; 39-40; 44-46; 71). Therefore, absent the choice-of-law clause in the contract entered into between Ricoh and The Stewart Organization, Alabama law would govern the enforceability of the forum-selection clause in the contract. *Pines, supra; First Nat. Life Ins., supra; Hill, supra.*

Nor is there any dispute in this case that Alabama has a *strong* public policy *against* the enforcement of contractual forum-selection clauses. *Redwing Carriers, supra; Conticommodity Services, supra.* Thus, to apply New York law in this case would result in enforcement of the forum-selection clause in direct conflict with the strong public policy of Alabama, the state whose law would otherwise apply. *Compare Redwing Carriers, supra, with Callanan Industries, Inc. v. Sovereign Construction Co., Ltd.,* 44 A.D.2d 292, 354 N.Y.S.2d 486 (1974). The Alabama courts, the court below, and the courts of New York have consistently refused to sanction such a result. Accordingly, Alabama law, rather than New York law, governs the enforceability of the forum-selection clause at issue.

III. Even If Federal Law Governs The Enforceability Of The Forum-Selection Clause At Issue, The Clause Should Not Be Enforced Because To Do So Would Contravene A Strong Public Policy Of The Forum State, Alabama.

Under *The Bremen,* as discussed earlier, the enforceability of a forum-selection clause turns on principles of contract law. 407 U.S. at 10-13. *See generally* Note, *Choice of*

Forum Provisions and the Intrastate Dilemma: Is Ouster Ousted? 48 Fordham L. Rev. 568, 569 (1980) (In *The Bremen,* 407 U.S. at 10-13, "the Court analyzed the international forum selection clause before it in accordance with traditional contract principles"). Of course, *Erie* was not even cited in *The Bremen,* because the federal courts have exclusive jurisdiction over admiralty cases and extensive power to develop law in the area of admiralty. In cases where the Rules of Decision Act applies, however, as in this case, the Act and the *Erie* doctrine require the application of state law in determining the enforceability of forum-selection clauses, as we have demonstrated in this brief.

Assuming, for the purposes of argument only, that federal law governs the enforceability of the forum-selection clause at issue in this case, federal law provides that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *The Bremen,* 407 U.S. at 16.

While *The Bremen* involved an international dispute in admiralty between companies of two different countries — the United States and Germany — and was concerned with whether the public policy of the United States would be violated by transferring the case to a foreign forum, numerous federal courts, in analyzing the enforceability of forum-selection clauses under federal law, have consistently held that a federal court, not sitting in admiralty, should decline to enforce a forum-selection clause if enforcement would contravene a strong public policy of the state in which suit is brought.[10] The reason for the caveat in *The Bremen* (as

[10] *See, e.g., Clarkco Contractors, Inc. v. Texas Eastern Gas Pipeline Co.,* 615 F. Supp. 775, 776 (M.D. La. 1985) ("[I]f [plaintiff] can show that enforcing the forum selection clause in this contract would contravene a strong Louisiana public policy, enforcement would be unreasonable and

adapted to non-admiralty cases) — federal law must not be enforced so as to contravene the public policy of the forum state —is obvious: the federal system of the United States reserves to each state many powers, preeminent among them is the right to safeguard the welfare and rights of its citizens.

In this case, however, the decision by the court below represents an unsupportable intrusion upon federalist principles. Alabama has expressed a strong public policy against enforcement of forum-selection clauses so that its citizens cannot be forced to vindicate their rights in distant, expensive forums, or lose their rights. Quite simply, the Court should give the "public policy" test articulated in *The Bremen* the only possible correct interpretation in *this* context — the forum-selection clause should not be enforced because to do so would contravene a strong public policy of the forum state, Alabama. After all, "the existence of the states as governmental entities and as the source of the standing law is in itself the prime determinant of our working federalism." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546 (1954).

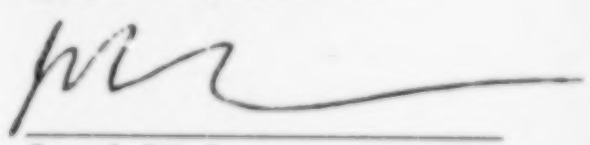
---

under the teaching of *The Bremen, supra*, that provision should not be enforced"); *ECC Computer Centers v. Entre Computer Centers, Inc.*, 597 F. Supp. 1182, 1185-86 (N.D. Ill. 1984) (clause not enforced because enforcement would contravene public policy of Illinois); *D'Antuono v. CCH Computax Systems, Inc.*, 570 F. Supp. 708, 711-12 (D. R.I. 1983) (in determining enforceability of clause, court must consider "the public policy of the initial forum state"); *Quick Erectors, Inc. v. Seattle Bronze Corp.*, 524 F. Supp. 351, 356-57 (E.D. Mo. 1981) (clause not enforced because enforcement would violate "a public policy of the State of Missouri"); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 909 (E.D. Wis. 1981) (clause not enforced because enforcement would contravene the public policy of Wisconsin as expressed in its Fair Dealership Law).

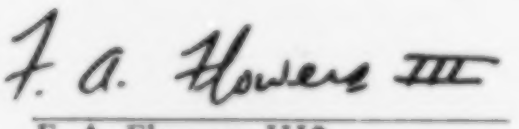
CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit, and remand the case to the court of appeals with directions to enter a judgment affirming the order of the district court entered herein on January 29, 1985.

Respectfully submitted,



Joseph W. Letzer



F. A. Flowers, III*

Counsel for Petitioners,
The Stewart Organization,
Inc.; Walter H. Stewart, and
James S. Snow, Jr.

**Counsel of Record*

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

November 25, 1987

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1908 (D)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

RESPONDENTS' BRIEF ON THE MERITS

SCOTT M. PHELPS*
RALPH H. YEILDING
Counsel for Respondents, Ricoh Corporation and Ricoh of America, Inc.

*Counsel of Record

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

BEST AVAILABLE COPY

58 pp

QUESTION PRESENTED

Is a United States District Court exercising both federal question and diversity jurisdiction required to follow state law when deciding whether to transfer a case to another United States District Court pursuant to the litigants' contractual designation of venue and 28 U.S.C. § 1404(a)?

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. FEDERAL LAW DETERMINES WHETHER A UNITED STATES DISTRICT COURT IS EMPOWERED TO TRANSFER A SUIT BROUGHT IN FEDERAL COURT WHERE PARTIES HAVE CONTRACTUALLY AGREED UPON THE APPROPRIATE VENUE	13
A. The Enactment By Congress Of A General Uniform Statutory Scheme Governing Venue Demonstrates That Venue Within The Federal Court System Is A Matter Of Inherent Federal Concern.	13
B. Adherence To A State's Policy Regarding Venue Selection Agreements In A Case Within The Federal Court System Would Result In A "Direct Collision" With Federal Venue Enactments	17

C. The Principles Of *Erie* Dictate That Federal Law Applies To Determine Whether A Contractual Designation Of Venue Within The Federal Court System Is Enforceable.	22
1. A contractual agreement by parties prior to litigation does not necessarily oblige federal courts to follow state law under the *Erie* doctrine.	25
2. Application of federal law to the issue in dispute would not contravene either of the "twin evils of *Erie*": forum shopping and the inequitable administration of the laws.	28
3. *Erie* does not limit federal courts merely to addressing issues raised on the face of the Constitution or federal statutes.	31
D. Enforcement Of The Contractual Designation Of Venue Within The Federal Court System Offends No Applicable State Public Policy.	34

II. FEDERAL LAW UPHOLDS THE CONTRACTUAL DESIGNATION OF VENUE FOR SUITS BROUGHT IN FEDERAL COURT 36

A. The Statutory Scheme Governing Venue In The Federal Court System Demonstrates The Intent Of Congress To Enforce The Contractual Designation Of Venue By Parties 36

B. Under This Court's *Bremen* Decision, The Parties' Contractual Designation Of Venue Within The Federal Court System Is Due To Be Enforced 38

CONCLUSION 47

TABLE OF AUTHORITIES

Cases *Page(s)*

AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148 (2d Cir. 1984) 40

Benge v. Software Galeria, Inc., 608 F. Supp. 601 (E.D. Mo. 1985). 46

Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982) 40

Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) 44,46

Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U.S. 436 (1920) 24,29

Boyd v. Grand Trunk W. R. Co., 338 U.S. 263 (1949) 45

Bryant Electric Co., Inc. v. City of Fredericksburg, 762 F.2d 1192 (4th Cir. 1985) 40

Burger King Corp. v. Rudzewicz, 471 U.S. 472 (1985) 20,39

Byrd v. Blue Ridge Electric Cooperative, 356 U.S. 525 (1958) ..... *passim*

Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985) 41

Commercial Casualty Insurance Co. v. Consolidated Stone Co.,
278 U.S. 177 (1928) 37

Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen,
387 U.S. 556 (1967) 16,37

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) ..... *passim*

Ex Parte Collett,
337 U.S. 55 (1949) 16

Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.,
806 F.2d 848 (8th Cir. 1986) 41

Fireman's Fund American Insurance Cos. v. Puerto Rican Forwarding Co., Inc.,
492 F.2d 1294 (1st Cir. 1974) 40

General Engineering Corp. v. Martin Marietta Alumina, Inc.,
783 F.2d 352 (3d Cir. 1986) 41

Goodwin v. George Fischer Foundry Systems, Inc.,
769 F.2d 708 (11th Cir. 1985) 36

Guaranty Trust Co. v. York,
326 U.S. 99 (1945) 23,25,30

Hanna v. Plumer,
380 U.S. 460 (1965) ..... *passim*

In Re Fireman's Fund Insurance Cos., Inc.,
588 F.2d 93 (5th Cir. 1978) 41

LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.,
739 F.2d 4 (1st Cir. 1984) 39

Leroy v. Great Western United Corp.,
443 U.S. 173 (1979) 37

Lowery v. Zorn,
243 Ala. 285, 9 So. 2d 872 (1942) 36

Luce v. Edelstein,
802 F.2d 49 (2d Cir. 1986) 40

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) ..... *passim*

Miller v. Granados,
529 F.2d 393 (5th Cir. 1976) 25

Mississippi Publishing Corp. v. Murphree,
326 U.S. 438 (1946) 16

National Equipment Rental, Ltd. v. Szukhent,
375 U.S. 311 (1964) 19,20

Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.,
308 U.S. 165 (1939) 20,21,24

Northrop Corp. v. Triad International Marketing S.A.,
811 F.2d 1265 (9th Cir. 1987) 41

Olberding v. Illinois Central Railroad Co.,
346 U.S. 338 (1953) 37

Parsons v. Chesapeake & Ohio Railway Co.,
375 U.S. 71 (1963) 19

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 19

Pope v. Atlantic Coast Line Railroad Co.,
345 U.S. 379 (1953) 17

Pope & Talbot, Inc. v. Hawn,
346 U.S. 406 (1953) 40

Redwing Carriers, Inc. v. Foster,
382 So. 2d 554 (Ala. 1980) ..... *passim*

Snyder v. Smith,
736 F. 2d 409 (7th Cir. 1984) 41

Sola Electric Co. v. Jefferson Electric Co.,
317 U.S. 173 (1942) 14

Sun World Lines, Ltd. v. March Shipping Corp.,
801 F.2d 1066 (8th Cir. 1986) 41

Swift v. Tyson,
41 U.S. 1 (1842) 23

Taylor v. Martin,
466 So.2d 977 (Ala. Civ. App. 1985) 36

The Stewart Organization, Inc. v. Ricoh Corp.,
779 F.2d 643 (11th Cir. 1986) 1,9

The Stewart Organization, Inc. v. Ricoh Corp.,
810 F.2d 1066 (11th Cir. 1987)
(*en banc*) ..... *passim*

Turf Paradise, Inc. v. Arizona Downs,
670 F.2d 813 (9th Cir. 1982) 25

United States v. Little Lake Misere Land Co.,
412 U.S. 580 (1973) 33,40

Van Dusen v. Barrack,
376 U.S. 612 (1964) ..... *passim*

Wilburn Boat Co. v. Fireman's Fund Insurance Co.,
348 U.S. 310 (1955) 40

STATUTES AND RULES

1 Stat. 73 (Judiciary Act of 1789) 14,15

28 U.S.C § 1254(1) (1976) 2

28 U.S.C. § 1292(b) (1976) 8

28 U.S.C. §§ 1391 *et. seq.* (1976) 10,15,16

28 U.S.C.§ 1404(a) (1976) ..... *passim*

28 U.S.C. § 1406(a) (1976) ..... *passim*

28 U.S.C. § 1406(b) (1976) 37

28 U.S.C. § 1441(b) (1976) 28

28 U.S.C. § 1652 (1976) 22,31,32

28 U.S.C.§ 2207 (1976) 10,15

F.R.C.P. 12(b)(3), 41(b), 82 10,15

Ala. Code § 6-3-1 (1975) 35

Ala. Code § 6-3-21.1 (1987 Supp.) 18

Ala. Code § 6-5-430 (1987 Supp.) 18

OTHER MATERIALS

H. Hart & H. Wechsler, *The Federal Courts and the Federal System* (1953) 24

M. Redish & C. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356 (1977) . 23,24

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§ 3801 *et seq.* (1976) 24,37

No. 86-1908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

RESPONDENTS' BRIEF ON THE MERITS

OPINION BELOW

The *en banc* decision of the United States Court of Appeals for the Eleventh Circuit is reported in *The Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (*en banc*). The court's opinion is reproduced in the Appendix to the Petition for Writ of Certiorari at pages 1-21. The panel decision of the United States Court of Appeals for the Eleventh Circuit is reported in *The Stewart Organization, Inc. v. Ricoh Corp.*, 779 F.2d 643 (11th Cir. 1986), and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages 23-41. The order of the district

court is reproduced in the Appendix to the Petition for Writ of Certiorari at pages 42-43.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clauses 9 and 18.

The Congress shall have Power ... To constitute Tribunals inferior to the supreme Court ... And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. § 1391(b) Venue generally.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be

brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

28 U.S.C. § 1404(a) Change of venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1406(a) Cure or waiver of defects.

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C.§ 1652 State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Which United States District Court will conduct the trial of this antitrust, breach of contract, and fraud case? That is the sole question posed by petitioners' request that this Court review and reverse the *en banc* decision of the United States Court of Appeals for the Eleventh Circuit ordering the transfer of this case, pursuant to 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406(a), to the United States District Court for the Southern District of New York in accordance with the contractual designation of venue by the parties.

A. Background.

Respondent Ricoh Corporation is the successor-in-interest to Ricoh of America, Inc. (referred to collectively herein as "Ricoh"), a nationwide manufacturer of copier products whose corporate headquarters are located in West Caldwell, New Jersey, a suburb located across the Hudson River from the Borough of Manhattan, New York City, New York. In addition to its corporate headquarters, Ricoh also maintains seven other corporate office locations placed throughout the New York City metropolitan area, three of which are located in the Borough of Manhattan in New York City. (J.A. 46-48).

Petitioner, The Stewart Organization, Inc., is an Alabama corporation whose controlling shareholders are petitioners Walter H. Stewart and James S. Snow, Jr. (Stewart Depo. at 25, Depo. Exhibit 1). The Stewart Organization is the successor-in-interest to a corporation known as Birmingham Business Equipment Company ("BBEC"), which at the time of

its purchase by Snow and Stewart in 1979 was a retail dealer of the Savin line of copier products.[1] During the Fall of 1982, The Stewart Organization decided to switch from Savin to a different line of copier products, and at this time, Ricoh needed a retail copier dealer in Central Alabama, so it contacted Mr. Walter H. Stewart.[2] (Stewart Depo. at 40, 60-63, 67-68). Following several conversations and meetings during the Fall of 1982 and Winter of 1983, The Stewart Organization decided to become a Ricoh dealer, and Mr. Stewart arranged a date for the Ricoh representative to come to Birmingham from his Atlanta office so that The Stewart Organization could execute the Dealer Sales Agreement. (Stewart Depo. at 40, 46).

Pursuant to their arrangement, the Ricoh representative and Mr. Stewart met at The Stewart Organization's offices in Birmingham on February 12, 1983 to finalize the terms of the Dealer Sales Agreement. (Stewart Depo. at 53-56). At this meeting, Mr. Stewart flipped through the Dealer Sales Agreement and read those terms specifically written into the Agreement by the Ricoh representative. (Stewart Depo. at 54-56). Mr. Stewart acknowledges

---

[1] A lawsuit was filed by the former owners of BBEC against Mr. Stewart and Mr. Snow in federal district court alleging claims of fraud arising out of the purchase of BBEC. *Robert Blackmon, et al. v. James S. Snow, Jr. and Walter H. Stewart*, CV83-PT-1034S. (N.D. Ala.). Apparently, this lawsuit has now been resolved.

[2] The Stewart Organization is currently a plaintiff in another lawsuit in the Northern District of Alabama against the Savin Corporation, the previous copier manufacturer represented by Stewart, in which it is alleging similar claims to the claims alleged in this lawsuit. CV83-H-2305S (N.D. Ala.).

that he did not take the time to read the form provisions contained in the Dealer Sales Agreement. In particular, Mr. Stewart admits he never read Paragraph 18.1 setting forth the parties' contractual designation of venue. (Stewart Depo. at 53-54, 57,71). After Ricoh executed the Agreement in New Jersey and approved The Stewart Organization as a Ricoh dealer, Mr. Stewart acknowledges he simply filed the Agreement away in a drawer. (J.A. 43-44, Stewart Depo. at 53-54, 57).

Mr. Stewart possesses considerable business experience and acumen. After graduating in 1968 from the University of Alabama with a bachelor's degree in Accounting, he passed the exams necessary to become a Certified Public Accountant and worked for two years for the Big Eight Accounting firm of Haskins and Sells. In 1970, he started his own accounting firm in Birmingham, Alabama, and by the time he signed the Dealer Sales Agreement on behalf of The Stewart Organization, he had been a practicing accountant for fifteen years, and was a senior partner in a prestigious seven-man accounting firm known as Snow, Stewart, Hubbard & Cade. (Stewart Depo. at 8-9).

Aside from his extensive accounting experience, Mr. Stewart also possesses considerable entrepreneurial ability and spirit, having owned a number of highly successful businesses in addition to his accounting practice and the Stewart Organization. For approximately six years, Mr. Stewart and Mr. James S. Snow, Jr. each owned one-half of a metal fabricating business that generated between $1,500,000 and $2,000,000 in annual sales and employed 65 persons at the time Mr. Stewart and Mr. Snow sold their controlling interest in 1981. (Stewart Depo. at 14-16). In 1979, in addition to purchasing

BBEC, Mr. Stewart and Mr. Snow also purchased one-half of a swimming pool construction business and held this business for approximately one year, during which time it produced approximately $800,000 in sales. (Stewart Depo. at 17-18). In addition to these activities, Mr. Stewart has continued to remain active in the retail copier business through his ownership of The Stewart Organization, Inc., which sold the Panasonic line of copier products at the commencement of this suit in 1984. (Stewart Depo. at 62).

In short, Mr. Stewart's extensive accounting and business experience conclusively demonstrate he is not the hapless consumer petitioners have attempted to portray throughout this litigation. Mr. Stewart is a highly successful businessman fully capable of representing his own interests in business affairs.

B. District Court Proceedings.

In October, 1984, petitioners, The Stewart Organization, Inc. and its principal shareholders, Walter H. Stewart and James S. Snow, Jr., (hereinafter referred to collectively as "petitioners" or "Stewart") filed this action in the United States District Court for the Northern District of Alabama alleging federal antitrust violations, breach of contract, breach of warranty, and fraud against Ricoh of America, Inc. and its successor-in-interest, Ricoh Corporation. (J.A. 4-16). Each of petitioner's claims arose from the dealer-manufacturer relationship which existed between Stewart and Ricoh from February, 1983 until mid-1984. Subject matter-

jurisdiction was based on *both* the federal question and diversity jurisdiction of the federal courts. (J.A. 1).[3]

In response to Stewart's complaint, Ricoh filed a motion to dismiss or transfer under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a). (J.A. 17). The choice-of-venue and choice-of-law clauses contained in Paragraph 18.1 of the Stewart-Ricoh Dealer Sales Agreement formed the basis of Ricoh's motion to dismiss or transfer. (J.A. 17-18). This provision states in full:

> 18.1 Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. *Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.*

(J.A. 72) (emphasis added). The district court denied Ricoh's motion to dismiss or transfer, concluding that Alabama law governed the enforceability of a contractual designation of venue within the federal court system and that under Alabama law, contractual agreements designating venue are void as against public policy. Pet. Cert. App. 42-43. However, the district court certified its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and the Eleventh Circuit accepted jurisdiction. (J.A.2); Pet. Cert. App. 25-26.

[3]Petitioners repeatedly characterize this case as a diversity case when in fact, subject matter jurisdiction is premised on both federal question and diversity jurisdiction. (J.A.5).

C. Proceedings in the Eleventh Circuit.

By opinion of January 10, 1986, Judges Johnson and Tuttle stated, "[t]he issue here is the enforceability of choice-of-forum and choice-of-law clauses freely adopted in arms-length contractual negotiations." *Stewart*, 779 F.2d at 646. They concluded "venue in a diversity action is manifestly within the province of federal law" and under federal law, a contractual designation of venue should be enforced. *Id.* at 647, 649-50. The dissent argued that the United States District Courts are bound by the laws of the states in which they sit in determining whether to enforce the contractual designation of venue in lawsuits brought in the federal court system under diversity jurisdiction, and Alabama's policy precluded transfer of this case. *Id.* at 651.

The Eleventh Cicuit upheld the panel decision upon *en banc* reconsideration. *Stewart*, 810 F.2d at 1067. While the majority differed as to the appropriate rationale for applying federal law, the Court concluded the contractual designation of venue by Stewart and Ricoh was enforceable as a matter of federal law, and that Alabama's public policy did not preclude the enforceability of the contractual designation of venue by Stewart and Ricoh. *Id.* at 1067-76. The dissent again maintained that Alabama law should be applied to determine the enforceability of the contractual designation of venue by parties to a lawsuit brought in the federal court system. *Id.* at 1076-77.

SUMMARY OF ARGUMENT

The venue of a lawsuit brought in the federal court system is inherently a matter of federal concern. Since the creation of the federal judiciary in 1789, Congress has enacted numerous laws governing venue, including the current general statutory scheme governing venue embodied in 28 U.S.C. § 1391 *et seq.*, which addresses such matters as venue in diversity and non-diversity cases, changes of venue and procedures for handling defects in venue. Moreover, under the Rules Enabling Act, 28 U.S.C. § 2207 (1976), Congress has further empowered this Court to enact procedural rules addressing venue, a power this Court has exercised by enactment of Rules 12(b)(3), 41 and 82 of the Federal Rules of Civil Procedure. Hence, by virtue of the very breadth of its legislative enactments, it is clear that Congress has empowered the federal courts to decide questions concerning the appropriate venue of lawsuits brought in the federal court system, and in particular, to consider whether parties may contractually designate the venue of a lawsuit brought in the federal court system.

Moreover, 28 U.S.C. § 1404(a) grants each United States District Court the authority to transfer cases to another United States District Court for "the convenience of the parties and witnesses, in the interest of justice." The broad scope of such statutory language authorizes the United States District Courts to consider whether it is "in the interest of justice" to enforce the contractual designation of venue by the parties, independent of whatever venue rule the Supreme Court of Alabama may have stated with respect to the Alabama court system.

As noted in *Hanna v. Plumer*, 380 U.S. 460 (1965), "*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of the rules will inevitably differ from comparable state rules." *Id.* at 473. Given that venue merely deals with the locality in which a lawsuit will be heard in the federal court system, and given that under the parties choice-of-law agreement and *Van Dusen v. Barrack*, 376 U.S. 612 (1964), a transfer of venue pursuant to a choice-of-venue agree ıent in no way affects the underlying body of federal or state law that will be applicable to the dispute between the parties, it follows that the designation of venue within the federal court system is merely a procedural concern affecting the administration of the federal court system.

Accordingly, this case does not even reach the troublesome issue posed in *Erie* and its progeny where enforcement of a federal right directly affected the substantive outcome of the litigation. Rather, the sole outcome of this Court's decision in this case will be a determination as to which United States District Court will hear this case. Hence, neither of the "twin evils of *Erie*" -- forum-shopping and the inequitable administration of the laws -- are implicated by empowering a United States District Court to transfer this case to another United States District Court in accordance with the parties' contractual designation of venue.

Moreover, the public policy of the State of Alabama relied upon by petitioners and expressed in *Redwing Carriers v. Foster*, 382 So. 2d 554 (Ala. 1980), by its very terms applies only to the state courts of Alabama. The expressed policy of Alabama is to hold

invalid "contract provisions which attempt to limit the *jurisdiction of the courts of this state.*" *Id.* at 556 (emphasis added). *Redwing Carriers* expresses an exclusive concern with the divestiture of the jurisdiction of Alabama courts, and cannot be fairly read as conferring substantive rights upon litigants. As the Eleventh Circuit correctly observed, "[s]ince this case will be tried in federal court, the protection of state court jurisdiction is not involved. There are simply no federalism concerns in deciding which federal court will try a case of federal jurisdiction." *Stewart*, 810 F.2d at 1070.

The seminal case addressing the issue of the enforceability of a contractual designation of venue is *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), wherein this Court held such choice-of-venue agreements enforceable unless a party could "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15. Applying the *Bremen* test to the facts of this case, it is clear the Eleventh Circuit was correct in concluding that petitioner Stewart failed to carry its burden of proof to show clearly it would be unreasonable to hold Stewart to its bargain and transfer its lawsuit against Ricoh to the United States District Court of the Southern District of New York.

ARGUMENT

I. FEDERAL LAW DETERMINES WHETHER A UNITED STATES DISTRICT COURT IS EMPOWERED TO TRANSFER A SUIT BROUGHT IN FEDERAL COURT WHERE PARTIES HAVE CONTRACTUALLY AGREED UPON THE APPROPRIATE VENUE.

A. The Enactment By Congress Of A General Uniform Statutory Scheme For Venue Demonstrates That Venue Within The Federal Court System Is A Matter Of Inherent Federal Concern.

Relying on *Hanna v. Plumer*, 380 U.S. 460 (1965), the Eleventh Circuit held, "venue in a diversity case is manifestly within the province of federal law." *Stewart* 810 F.2d at 1068. Petitioners' hypertechnical reading of *Hanna*, based on the argument that the ruling in *Hanna* is premised on specific language being contained in a federal rule or statute addressing the narrow issue in dispute and thereby creating a "direct collision" between federal and state law, is not correct. (Petitioners' Brief at 21-22, 28-29). Indeed the *Hanna* Court foreshadowed such an overly restrictive reading of its opinion and commented: "In the first place, it is doubtful that even if there was no federal rule . . . the *Erie* rule would have obligated the district court to follow [state] procedure." *Hanna*, 380 U.S. at 466. Consequently, *Hanna* deals with the appropriate resolution of a conflict or "direct collision" between a federal interest as embodied in a federal statutory scheme and an opposing state law. As the *Hanna* Court commented:

> The Erie rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged . . .

380 U.S. at 470.

So the initial inquiry is the extent to which Congress has attempted to legislate, pursuant to a valid federal interest, a comprehensive statutory plan for venue in the United States District Courts, because "the doctrine of [*Erie*] is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its course in those statutes, rather than local law." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). The evolution of federal law concerning venue in the federal court system reveals the sweep of federal power exercised by Congress concerning venue has indeed been dominating.

From the creation of the federal judiciary in 1789, Congress recognized that controlling the venue of lawsuits filed in the newly created federal court system was central to the administration of the federal courts. In Section 11 of the Judiciary Act of 1789, the first Congress enacted a specific statutory venue rule, stating venue for civil actions brought within the federal court system must be brought either in the district in which the defendant resided or in which the

defendant was located. Judiciary Act of 1789, § 11, 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1391 (1976)). In addition, in Section 17 of the Judiciary Act of 1789, Congress explicitly granted the federal courts the broad power "to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States." *Id.* at § 17. Hence, as evidenced by Sections 11 and 17 of the Judiciary Act of 1789, the first Congress recognized venue within the federal court system to be a matter of federal concern that should be specifically addressed by federal law and not left to the inconsistencies and conflicts of the various state laws.

Since 1789, Congress has expanded upon its original statutory venue scheme as circumstances have changed, and the current general statutory scheme for venue is embodied in 28 U.S.C. § 1391 *et seq.* This general federal venue scheme consists of no less than seventeen individual statutes in Title 28 that address such matters as venue in diversity and non- diversity cases, changes of venue, and procedures for handling defects in venue. *See* 28 U.S.C. §§ 1391-1406. There are also numerous federal substantive statutes that contain special venue provisions. *See* Appendix F to American Law Institute, Study of Division of Jurisdiction between State and Federal Courts, Official Draft, 1969, pp. 498-501 (listing 330 venue provisions in portions of the United States Code other than Title 28).

Furthermore, through the Rules Enabling Act, 28 U.S.C. § 2207, Congress authorized this Court to create rules of procedure to address such matters as how questions concerning venue should be raised. This Court has enacted Rules 12(b)(3), 41 and 82 of the Federal Rules of Civil Procedure to set forth how

venue matters are to be addressed in federal court. The breadth of these legislative enactments relating to venue evidence Congressional recognition, since the creation of the federal judiciary in 1789, that regulating venue in the federal court system is a matter of inherent federal concern, and as this Court recognized in *Hanna*, "matters which relate to the administration of legal proceedings [are] an area in which federal courts have traditionally exerted strong inherent power." *Hanna*, 380 U.S. at 472-73.

This Court has often been asked to interpret the meaning or reach of various federal venue rules, and, to date, has never wavered from the position that the venue of a lawsuit is a procedural concern which merely affects the administration of the federal court system. *See Ex Parte Collett*, 337 U.S. 55, 71 (1949) (applying § 1404(a), the Court held that "[n]o one has a vested right in any given mode of procedure. . . ."); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1945) (that a litigant may be forced to litigate in a certain forum "relates merely to the manner and the means by which a right to recover . . . is enforced,"); *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967) (28 U.S.C. § 1391(b), governing venue of cases not arising solely under diversity of citizenship, is "wholly procedural"). In sum, both because of the sweep of congressional venue statutes and because of this Court's consistent recognition that venue is a federal procedural concern, the appropriate venue of lawsuit within the federal judicial system must be determined through interpretation of federal law.

B. Adherence To A State's Policy Regarding Venue Selection Agreements In A Case Within The Federal Court System Would Result In A "Direct Collision" With Federal Venue Enactments.

Not only does the extensive Congressional statutory scheme regarding venue within the federal system generally preempt state policies concerning venue, the state policy posited by petitioners in this case, if given effect, would directly collide with specific federal venue enactments. As the court below correctly recognized, "to the extent that Congress has enacted federal procedural rules (and implicitly federal statutes governing federal court procedure), the question is governed by Federal law." *Stewart*, 810 F.2d at 1068.

28 U.S.C. §§ 1404(a) and 1406(a) both prescribe statutory housekeeping rules enabling a United States District Court to transfer a case to a more appropriate venue within the federal court system in accordance with the contractual designation of venue by parties. Thus, the federal interest required by the *Hanna* Court in order to create a direct collision with state law is plainly present here.

Section 1404(a) involves exclusively federal concerns and flatly forecloses the possibility that state law can override its application in cases brought in the federal court system. The statute "by its very terms, speaks to federal courts; [and] . . . its function is to vest . . . a federal forum with the power to transfer a transitory cause of action to a more convenient federal court." *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 384 (1953). This Court's decisions reveal Section 1404(a) authorizes transfers in the interests of

convenience and fairness without regard to what any state's policy on the subject may be.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Court was presented with the mass tort claims of forty aircrash victims who initiated suit in the Eastern District of Pennsylvania. The defendants sought a transfer under Section 1404(a), which the plaintiffs opposed. Finding the power of federal district courts to transfer cases under Section 1404(a) is one unaffected by state law substantive rules, Justice Goldberg wrote: "[Section 1404(a)'s] remedial purpose - the individualized, case-by-case consideration of convenience and fairness - militates against restricting the number of permissible forums within the federal system." *Id.* at 622-23 (footnote omitted). Petitioners would have this Court turn *Van Dusen* around and hold just the opposite: that the federal district court in this case was bound by state law *not* to consider any other appropriate forum under Section 1404(a).[4]

The *Van Dusen* Court was also explicit in ruling that the plaintiff cannot choose an inconvenient or unfair forum and then have the federal court ignore Section 1404(a) and ratify his choice: "The power to

[4]Until enactment of two new venue statutes in June, 1987, Alabama did not permit an Alabama state court to transfer a case on the basis of *forum non conveniens*. *See* Ala. Code § 6-3-21.1 (1987 Supp.) (authorizing changes of venue within Alabama court system) and § 6-5-430 (1987 Supp.) (allowing changes of venue for suits based on claims arising outside Alabama, including those arising under laws of the United States). Applying petitioner's *Erie* argument to its logical conclusion, petitioners would have this Court ignore Section 1404(a) entirely in diversity cases since the law of the forum state did not recognize the principles of *forum non conveniens* underlying Section 1404(a).

defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by *federal law* and not from the deliberate conduct of a party favoring trial in an inconvenient forum." *Id.* at 624. (emphasis added).

Van Dusen further makes clear that the only possible *Erie* question in a Section 1404(a) context arises when the transferor and transferee forums would apply different bodies of substantive law, and *Van Dusen* lays such a concern to rest by holding that the law of the transferor forum is applicable in diversity cases. *Id.* at 639. Hence, Section 1404(a) is nothing more or less than " 'a federal housekeeping measure,' allowing easy change of venue within *a unified federal system*." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (emphasis added). *See also Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 73-74 (1963) (a federal court's power to transfer a case under Section 1404(a) does not depend upon what a similarly situated state court would do).

In *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964), this Court addressed an issue analogous to the question now before the Court. In *Szukhent*, a Michigan farmer executed an equipment lease with a New York corporation contractually agreeing to designate a particular individual as his agent for service of process in the State of New York. *Id.* at 313-14. The New York corporation brought an action for default on the lease against the Michigan farmer in federal court in New York and obtained personal jurisdiction over the Michigan farmer by serving the designated agent for service of process in New York. *Id.* On appeal, this Court considered the issue of whether a resident of one state may agree to submit to the jurisdiction of a federal court sitting in another state by contractually designating an agent

for service of process, and the Court held as a matter of federal law that parties may contractually agree on an agent for service of process and thereby submit to the jurisdiction of a particular court. *Id.* at 318. As the Court stated,

> the purpose underlying the contractual provision here at issue seems clear. The clause was inserted ... in order to assure that any litigation under the lease should be conducted in the State of New York. The contract specifically so provided .... and it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisidiction of a given court ....

Id. at 315-16. Likewise, in this case, the purpose of the contractual designation of venue by Stewart and Ricoh was to assure that any litigation arising out of the parties' relationship would be conducted in the Borough of Manhattan, New York City, New York. Hence, the holding of *Szukhent* is obviously applicable to this case. *See also Burger King Corp. v. Rudzewiez*, 471 U.S. 462, 472 (1985) (in footnote 14, the Court notes the similarity between the issue in *Szukhent* and the issue of whether to enforce a choice-of-forum clause). In fact, to apply petitioners' *Erie* analysis in this case would effectively overturn *Szukhent* since it would mean that federal courts must look to state law to determine whether agreements relating to the personal jurisdiction of federal courts are enforceable as well as agreements relating to the venue of federal courts.

Likewise, in *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165 (1939), the Court addressed another issue closely analogous to the issue presented here. In *Neirbo*, a corporation designated an

agent to accept service of process pursuant to a state's statutory requirements pertaining to qualification to do business within the state. Then, when a lawsuit was brought against the corporation in a federal court sitting in the state, an issue arose as to whether the corporation had consented to venue within the state by designating an agent to accept service of process within the state. *Id.* at 167. This Court held as a matter of federal law that a party consented to venue by designating an agent to accept service of process. Interestingly, *Neirbo* was decided one year after *Erie*, and in writing for the Court, Justice Frankfurter specifically addressed the lurking *Erie* question:

> In finding an actual consent by Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that "state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of the case." [citation omitted].

Id. at 175. Thus, after considering the *Erie* question, the Court concluded that the designation of venue involved a matter of federal procedure that should be governed by federal law. *Neirbo* therefore reinforces the applicability of federal law to determine the enforceability of a choice-of-venue agreement since there is no meaningful distinction to be made under *Erie* between a party agreeing to venue by contract or by designating an agent to accept service of process pursuant to a state statute.

Section 1404(a) grants the federal district court broad discretion to transfer such actions "for the convenience of parties and witnesses, in the interest of

justice." Further, Section 1406(a) instructs the federal district court to dismiss or transfer an action brought in the "wrong" district. Properly framed, the issue before the Court is whether enforcement of the contractual designation of venue by Stewart and Ricoh furthers "the convenience of parties and witnesses" and is "in the interest of justice" within the meaning of Section 1404(a), or alternatively, whether in light of the contractual designation of venue by the parties, Stewart has brought its action in the "wrong" district within the meaning of Section 1406(a). Plainly, such questions of statutory construction necessarily involve matters of federal law.

C. The Principles Of Erie Dictate That Federal Law Applies To Determine Whether A Contractual Designation Of Venue Within The Federal Court System Is Enforceable.

Petitioners ask this Court to subordinate the general statutory scheme enacted by Congress to govern venue in the federal court system to the peculiarities and inconsistencies of each state's venue law. Far from commanding such a result, the principles underlying *Erie* condemn it.

On one level, *Erie* involved a basic question of statutory interpretation--construction of a provision of the Rules of Decision Act, 28 U.S.C. § 1652 (1976):

> The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

The question presented in *Erie* was whether the term "laws" included the common law of a State as well as the statutory and constitutional law of the State. Overruling *Swift v. Tyson*, 41 U.S. 1 (1842), *Erie* held that the word "laws" embraced a State's common law as well as its positive law. *Erie*, 304 U.S. at 79. However, as Justice Reed remarked in his concurring opinion in *Erie*: "The line between procedural and substantive law is hazy but no one doubts federal power over procedure." *Id.* at 92. Since *Erie*, the federal courts have struggled with how to distinguish between matters of procedure and matters of substantive common law. *See Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525 (1958); *Hanna v. Plumer*, 380 U.S. 460 (1965). As the Supreme Court noted in *Hanna*, certain matters seem to exist in a twilight zone between procedure and substance and are "rationally capable of classification as either." *Id.* at 472.

By commenting that "no one doubts federal power over procedure," Justice Reed recognized that not only did *Erie* involve a question of statutory interpretation, but it also involved a case about federalism, and that in our system of federalism, which creates two separate court systems with concurrent jurisdiction over certain matters, the federal courts are vested with the authority to make those decisions necessary to administer their own autonomous court system. *See Hanna*, 380 U.S. at 474 (Harlan J., concurring); M. Redish and C. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356, 378 (1977). In other words, the federal court system need not rely on state law to determine its own internal operating rules and procedures.

As Chief Justice Warren noted in *Hanna*: "*Erie* and its offspring cast no doubt on the long- recognized power of Congress to prescribe housekeeping rules for federal courts even though some of these rules will inevitably differ from comparable state rules." *Hanna*, 380 U.S. at 473. Hence, the guiding principle of *Erie* is to distinguish those matters that primarily involve the administration of a separate and autonomous federal court system from those matters that have such a substantive effect on primary human conduct that applying federal law would subject state residents to conflicting rules of behavior. *Id.*; *see also Hanna*, 380 U.S. at 475 (Harlan J., concurring); H. Hart and H. Wechsler, *The Federal Courts and the Federal System*, 678 (1953); M. Redish and C. Phillips, *supra*, 91 Harv. L. Rev.at 378. Applied to this case, the question becomes whether the contractual designation of venue for a lawsuit filed in the federal court system is one of those matters that deals primarily with the administration of the federal court system or conversely, substantially affects primary human conduct.

Enforcing the parties' contractual designation of venue merely affects the locality of the United States District Court that will hear this case. *Neirbo*, 308 U.S. at 168; *see generally* Wright, Miller & Cooper, *Federal Practice and Procedure*: *Jurisdiction* § 3801 (1976). Whether Stewart's claims are presented to a United States District Court in Alabama or New York will have no bearing on the body of substantive law that will be applied to petitioners' federal and state law claims. *Van Dusen*, 376 U.S. at 639. Hence rather than contravening the principles underlying *Erie*, applying federal law to determine which United States District Court will hear a dispute that could only have been brought in federal court is entirely consistent with *Erie*. *See Blumenstock Brothers Advertising*

Agency v. Curtis Publishing Co., 252 U.S. 436, 440 (1920) (holding federal antitrust claims are within the exclusive province of the federal courts); *Miller v. Granados*, 529 F.2d 393, 395 (5th Cir. 1976); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 821 (9th Cir. 1982).

That the Alabama state courts would construe the parties' agreement differently merely begins the *Erie* analysis, for as the Court observed in *Guaranty Trust*, when "a right is enforceable in a federal as well as a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." *Guaranty*, 326 U.S. at 108. And in *Byrd*, the Court noted that "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Byrd*, 356 U.S. at 537. Petitioners' attempt to have this Court apply a rule of the Alabama Supreme Court to a matter of venue within the federal court system flies in the face of these *Erie* principles, and demands that the administration of the federal court system be subordinated to a rule governing the administration of a state court system.

1. **A contractual agreement by parties prior to litigation does not necessarily mean federal courts are bound to follow state law under the *Erie* doctrine.**

Petitioners make three separate and somewhat intertwined arguments based on *Erie* and its progeny, none of which can withstand close scrutiny. Petitioners' first *Erie* argument can be stated in the following syllogism:

1. The parties' designation of venue is contained in a contract.

2. The enforceability of any provision contained in a contract is governed by state law under *Erie* because contracts are creatures of common law.

3. Therefore, the parties' designation of venue by contract is governed by state law.

Pet. Brief at 12, 23-24. The fundamental flaw in this argument is that proposition #2 is misconceived. It states too much. Simply because parties agree upon a particular matter by contract does not mean *a fortiori* that the matter is governed by state law under the *Erie* doctrine. To the contrary, there are obviously matters that parties may agree upon by contract that are of such a procedural or administrative nature that they present questions of federal law under the *Erie* doctrine.

For instance, suppose parties agree by contract prior to litigation upon how to handle various discovery or evidentiary procedures in the event of litigation (*i.e.* interrogatories, requests for production, requests for admission, depositions, the timetable for discovery, etc.). Or suppose parties agree by contract before litigation upon the conditions for summary judgment or directed verdict, or upon a particular judge to hear their disputes or upon the conditions for recusal of a judge. Each of these matters deals with a procedural aspect of administering the federal court system and therefore any contractual arrangements concerning these matters presents a question of federal law under the *Erie* doctrine, irrespective of whether a state permits or prohibits such agreements in state courts. Likewise, the question of the locality or

venue of a lawsuit within the federal court system involves an administrative aspect of the federal court system, and therefore, the enforceability of a contractual arrangement designating venue presents a question of federal law under *Erie*.

Another way to illustrate the flaw in petitioners' *Erie* argument is to consider whether the Court's analysis in *Byrd* and *Hanna* would differ if the issue in those cases had arisen in a contractual setting rather than as a result of conflicting state and federal statutory or procedural rules. In other words, suppose that the parties in *Hanna* had agreed by contract prior to litigation upon who could accept service of process in the event of litigation, or suppose that the parties in *Byrd* had agreed by contract prior to litigation on whether a judge or jury would resolve factual disputes between the parties. Simply because the parties could have agreed to these matters by contract prior to litigation would not transform the procedural or administrative nature of each of these matters into a question of substantive state policy under *Erie*. The analysis under *Hanna* and *Byrd* would be precisely the same regardless of whether the issue arose within the context of a contractual clause or by virtue of a specific rule of the Federal Rules of Civil Procedure or federal statute.

In short, the fact that a contract is the mechanism by which parties designate venue (as opposed to reliance upon a federal statute or rule) is irrelevant under *Erie*. The critical inquiry under *Erie* is whether the designation of venue -- by contract, federal rule, or statute -- is the type of matter that involves an administrative or procedural aspect of operating the federal court system that should be governed by federal law, or rather, is a matter involving the

regulation of primary human conduct, thereby implicating state law.

2. Application of federal law to the issue in dispute would not contravene either of the "twin evils of *Erie*": forum shopping and the inequitable administration of the laws.

The dissenters from the Eleventh Circuit's ruling expressed concern that enforcement of the contractual designation of venue would undermine the underlying purposes of the *Erie* doctrine. *Stewart*, 810 F.2d at 1077. Petitioners likewise argue that enforcement of a contractual designation of venue will undermine the goals expressed in *Hanna* of preventing the "twin evils of *Erie*": forum-shopping and the inequitable administration of the laws. Pet. Brief at 17-21. Petitioners contend that enforcement of the contractual designation of venue in strict diversity cases will promote forum-shopping because it will allow out-of-state plaintiffs to choose whether to adopt or avoid a contractual designation of venue by choosing to file their lawsuit in either state or federal court, while due to the one-way nature of the federal removal statute in strict diversity cases, 28 U.S.C. § 1441(b), in-state defendants have no such choice. Pet. Brief at 18.

Petitioners' argument places the cart before the horse. The reason for the discrepancy between the choice available to out-of-state plaintiffs and in-state defendants in this situation is a function of the way the one-way removal statute operates in strict diversity actions, not the differing venue rules that may be applied by federal and state courts. Any distinction between federal and state procedural law (*e.g.* differing rules of discovery, rules of evidence,

standards for summary judgment, etc.) provides out-of-state plaintiffs with a choice not enjoyed by in-state defendants in a strict diversity case, but this is merely a function of the way the removal statute operates, not because different venue rules are applied by state and federal courts.

Moreover, this case is not even a strict diversity case subject to the one-way removal statute. Given that petitioners' antitrust claims could only have been brought in federal court, this case is not even affected by the manner in which 28 U.S.C. § 1441(b) operates. *See Blumenstock*, 252 U.S. at 440. Thus, petitioners' complaint that this case involves the "sort of forum-shopping deplored by the Court in *Erie*," Pet. Brief at 18, is wholly unfounded: a resident defendant can, of course, remove a civil action where a federal court would possess federal question jurisdiction over subject matter. Hence, not only does petitioners' argument confuse cause and effect, it does not even apply to the facts of this case.

Petitioners' forum-shopping argument also ignores the fact that litigants make decisions daily as to whether to bring suit in federal or state court based on the differing venue rules of the respective federal and state court systems, irrespective of the existence of a contractual designation of venue. Litigants also weigh a host of other procedural variables when deciding whether to bring suit in federal or state court, such as differing rules of discovery and evidence, differing standards for summary judgment, and differing jury venires. Litigants evaluate these procedural differences regardless of the existence of a contractual agreement addressing these matters. In fact, rather than exacerbating the evil of forum-shopping, an agreement between parties in advance of litigation on any of these procedural matters,

including the choice of venue, would actually discourage forum-shopping, since it would reduce the number of procedural variables that litigants face in deciding between the federal and state court systems.

Petitioners' contention that enforcement of a contractual designation of venue will result in "the inequitable administration of the laws" likewise misses the point. Pet. Brief at 18-19. The argument that applying federal law to determine the enforceability of venue agreements in federal courts and applying state law to determine the enforceability of such agreements in state court would result in "the inequitable administration of the laws" because it would subject litigants to different rules in federal and state court simply proves too much. Such an argument holds true for *all* procedural distinctions between federal and state courts, whether such distinctions relate to standards for summary judgment, discovery, evidence or choice of venue. As this Court noted in *Byrd*, the mere fact that a distinction exists between a rule of a federal and state court is not a sufficient basis for applying state law. *Byrd*, 356 U.S. at 538. Petitioners have simply seized on the fact that there is a distinction between Alabama law and federal law without analyzing whether it is the type of distinction that is significant under *Erie*. Differing venue rules governing what tribunal will hear a dispute in state and federal court is simply not the type of distinction the Court addressed in *Hanna* when it expressed a concern over "the inequitable administration of the laws."

Unlike in *Erie*, *Guaranty Trust*, and *Hanna*, where the application of state or federal law to the issue at hand had a bearing on the outcome of the litigation, the only matter at issue in this case is which United States District Court will hear

petitioners' federal and state law claims. Regardless of which United States District Court hears this case, the same body of federal law will apply to petitioners' antitrust claims, and given the choice-of-law agreement between the parties, New York law will govern petitioners' state law claims.[5] Hence, while *Erie* and its progeny each presented cases where the outcome of the litigation hinged on whether state or federal law governed a particular issue, the issue presently before the Court does not even present such a dilemma to the Court. The only right affected by the outcome of this Court's decision is which United States District Court will hear this case; obviously such a determination does not result in the "inequitable administration of the laws" within the meaning of *Hanna*.

3. *Erie* does not limit federal courts merely to addressing issues raised on the face of the Constitution or federal statutes.

Petitioners' third *Erie* argument is that because the federal venue statutes do not specifically address on their face the narrow question of whether parties may contractually agree upon a designated venue in the federal court system, this matter must be left to state law as a question of "common law" under *Erie*. Pet. Brief at 21-22, 28-29. Petitioners' argument must fail for several reasons. First, the Rules of Decision Act, 28 U.S.C. § 1652, specifically provides that state law will not govern where "the construction, treaties or statutes of the United States otherwise *require or*

[5]Even absent the parties choice-of-law agreements, *Van Dusen* dictates that the same body of law would govern petitioners' state law claims. *Van Dusen*, 376 U.S. at 639.

provide." Hence, in addition to enforcing rights expressly provided in the Constitution, treaty or federal statute, the federal courts are empowered by the Rules of Decision Act to interpret the meaning of language contained in the Constitution, a treaty or federal statute to determine whether federal law is *required* to address a particular issue.

Second, petitioners have completely ignored the broad statutory language contained in Sections 1404(a) and 1406(a). *See* pp.17-22, *supra*. As already discussed, the statutory language contained in these venue provisions is sufficiently broad to encompass the issue now before the Court.[6] In an effort to have this Court apply state law, petitioners have developed a case of tunnel vision and have looked right past the broad statutory language contained in Sections 1404(a) and 1406(a).

Moreover, petitioners' underlying theory as to the respective roles of Congress and the federal judiciary in our constitutional form of government is fundamentally flawed. To accept the position advanced by petitioners that under *Erie* federal courts must not apply federal law unless a matter is expressly addressed directly on the face of the Constitution or a federal statute would force Congress to address every conceivable issue that may arise in connection with each statutory scheme it enacts. Pet. Brief at 21-22. Correspondingly, such a view would

[6]As Judge Tjoflat recognized in his concurring opinion below, the broad language of Section 1404(a) is entirely sufficient to enable the federal courts to rule on this matter as question of federal law: "Where, as here, the non-movant has not shown it would be unjust to honor a forum selection clause that is freely given, 'the interest of justice' requires that a non- movant be held to its promise." *Stewart*, 810 F.2d at 1075.

reduce the function of the federal courts to no more than monitoring the enforcement of the Constitution and federal statutes, and would entirely eliminate the judiciary's time honored role in interpreting broad constitutional or statutory language to fulfill the intent of the Framers and Congress.

An essential function of the federal judiciary is to interpret constitutional and statutory language to fulfill the intent of the Framers and Congress. As this Court noted in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973):

> [T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." [citation omitted].

Id. at 593.

Petitioners are asking this Court to abandon its interpretive function of "filling the gaps" in federal statutory schemes and to force Congress to address by express statutory language every conceivable issue that may arise in connection with each statutory scheme it enacts. This Court has never adopted such

an unduly narrow view of its role in our constitutional form of government and to adopt such a view would be completely contrary to this Court's historic role.

To illustrate the the irony of petitioners' argument, one need only contrast petitioners' view of the appropriate role of the federal judiciary with the role which the federal judiciary played in the very decision upon which petitioners rely -- *Erie v. Tompkins*. Petitioners' argument would mean this Court must overturn *Erie* because the Rules of Decision Act did not explicitly state on its face that the "common law" of a state was included within the scope of its coverage. Obviously, petitioners have misconstrued the meaning of *Erie*, as illustrated not only by the facts of *Erie* itself but by every other case this Court has considered where it has been called upon to interpret the meaning of a provision of the Constitution or a federal statute.

D. Enforcement Of The Contractual Designation Of Venue Within The Federal Court System Offends No Applicable State Public Policy.

Petitioners contend that the court below erred in enforcing the parties' contractual designation of venue in the federal court system because the Supreme Court of Alabama, the forum state in this case, has expressed a strong public policy in *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala. 1980), against enforcing choice-of-venue agreements in the state courts of Alabama. Pet. Brief at 17. Petitioners argue this Alabama public policy is equally applicable to the federal court system. Such an argument is plainly misplaced because the public policy expressed by the Alabama Supreme Court in *Redwing Carriers*, by its

very terms, is intended to apply only to the state courts of Alabama.

The expressed policy of Alabama is to hold invalid "contract provisions which attempt to limit the *jurisdiction of the courts of this state*," *Redwing Carriers*, 382 So. 2d at 556 (emphasis added). Despite petitioners' protestations that "[t]he right to have one's disputes resolved locally is ancient as the Magna Charta," Pet. Brief at 23, Alabama's policy is *not* to guarantee Alabamians a local forum, "so that its citizens cannot be forced to vindicate their rights in distant, expensive forums or lose those rights." Pet. Brief at 34. *Redwing Carriers* does not even implicitly rely on such a justification; as observed above, Alabama is solely concerned about the divestiture of its courts' *jurisdiction*. The *Redwing Carriers* policy, rather than conferring substantive rights upon Alabama litigants, is a policy of judicial administration intended to protect the jurisdictional autonomy of the *Alabama* judicial system.[7]

The case now before this Court has been, from the day of its initiation, within the *federal* court system; Alabama's policy of protecting the *jurisdiction* of its own courts plainly does not apply to the federal courts. As the Eleventh Circuit correctly observed, "[s]ince

---

[7]Petitioners also assert that Ala. Code § 6-3-1 (1975) reflects Alabama's antipathy toward contractual venue agreements. Pet. Brief at 17. However, § 6-3-1, perhaps even more clearly than *Redwing Carriers*, indicates that Alabama's public policy is intended to extend no further than the Alabama judicial system. Under the statute, parties are prohibited from agreeing to alter the venue "prescribed in this article." The Alabama Code naturally does not attempt to prescribe venue for any courts other than the state courts of Alabama. Thus, like *Redwing Carriers*, § 6-3-1 represents solely a procedural policy regulating where lawsuits within the *Alabama judicial system* may be tried.

this case will be tried in federal court, the protection of state court jurisdiction is not involved. There are simply no federalism concerns in deciding which federal court will try a case of federal jurisdiction." *Stewart*, 810 F.2d at 1070. As hard as they may try, petitioners simply cannot escape the fact that the public policy embodied in *Redwing Carriers* applies only to Alabama's court system; to assert otherwise is to confer a procedural hegemony upon Alabama that the State itself has neither articulated nor intended.[8]

II. FEDERAL LAW UPHOLDS THE CONTRACTUAL DESIGNATION OF VENUE FOR SUITS BROUGHT IN FEDERAL COURT.

A. The Statutory Scheme Governing Venue In The Federal Court System Demonstrates The Intent Of Congress To Enforce The Contractual Designation Of Venue By Parties.

Properly framed, the issue presented by this case is whether 28 U.S.C. §§ 1404(a) or 1406(a) permit the

[8]Petitioners presumptive reading of *Redwing Carriers* is at odds with other Alabama case law as well. The principle that contracts ostensibly violative of public policy are invalid "should be applied with caution and only in cases plainly within the reason on which the doctrine rests." *Lowery v. Zorn*, 243 Ala. 285, 288, 9 So. 2d at 874, (1942); *accord Taylor v. Martin*, 466 So. 2d 977, 979 (Ala. Civ. App. 1985); *Goodwin v. George Fischer Foundry Systems, Inc.*, 769 F.2d 708, 713 (11th Cir. 1985) (applying Alabama law). "If it definitely appears that enforcement of a contract will not be followed by injurious results generally, at least what the parties have agreed to ought not to be struck down," *Lowery*, 243 Ala. at 288, 9 So. 2d at 874. In the present case, it is patent that enforcement of a contractual venue provision by a *federal* court could not possibly result in injury to a *state* court's jurisdiction.

United States District Courts to transfer cases when parties agree contractually upon a designated venue for civil actions brought in the federal court system. To answer such a question, one must address the purpose and policies underlying these general federal venue statutes. This Court has stated repeatedly that the purpose of the general federal venue statutes is to establish venue in a location that is reasonably convenient to the litigants and witnesses. *See Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556 (1967). Section 1404(a) reflects this purpose by authorizing a federal court to transfer venue "for the convenience of parties and witnesses, in the interest of justice."

Given that the purpose of the general venue statutes is to further the convenience of parties and witnesses, this Court has held that venue is a personal privilege of a litigant, and as such, a litigant can consent to a chosen venue or waive objections to venue. *Commercial Casualty Insurance Co. v. Consolidated Stone Co.*, 278 U.S. 177 (1928); *see Olberding v. Illinois Central Railroad Co.*, 346 U.S. 338 (1953); *see generally* Wright, Miller & Cooper, *supra*, at §§ 3801, 3829. In fact, 28 U.S.C. § 1406(b) provides statutorily that a federal court maintains authority to hear a lawsuit if a party does not raise a timely objection to venue. Therefore, given federal statutory law explicitly provides that parties may agree by consent or waiver on a chosen venue *after* a lawsuit is filed, there is no reason why parties should not be able to agree on a designated venue before a lawsuit has been filed.

In this case, absent the contractual designation of venue by the parties, Stewart could have filed this

lawsuit in any United States District Court and such venue would have been entirely appropriate if Ricoh agreed by consent or waiver. Therefore, given that Stewart and Ricoh could agree on a designated venue *after* the filing of a lawsuit, it is clear under Section 1404(a) that it would be "for the convenience of the parties and witnesses [and] in the interest of justice" to allow these parties to agree on a designated venue *before* litigation. It would indeed be anomalous to apply federal law to determine whether parties may agree on a particular venue *after* a lawsuit is filed, but to apply state law to determine if parties can agree on venue *before* the filing of a lawsuit. The overriding issue is whether under the general federal venue statutes parties should be able to agree on a designated venue for a lawsuit brought in the federal court system. Given that the express purpose of the general federal venue rules is for the convenience and benefit of the parties, such a purpose is obviously furthered by allowing parties to agree on where to litigate their disputes before litigation ensues.

B. Under This Court's *Bremen* Decision, The Parties' Contractual Designation Of Venue Within The Federal Court System Is Due To Be Enforced.

The seminal case addressing the issue of the enforceability of a contractual designation of venue is *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *Bremen* involved a contract negotiated between a towage business and a company owning a drilling rig to transport the drilling rig from Louisiana to Italy. *Id.* at 2-3. The contract specified that any dispute would be heard in English courts. *Id.* When litigation ensued in federal court after the drilling rig was damaged during towage, this Court addressed the question of whether to enforce the contractual

designation of venue by the parties. The Court concluded that such agreements should generally be upheld unless a party could "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15.

Later in its *Bremen* opinion, the Court elaborated further on the heavy burden of proof a party opposing a contractually designated venue must carry in order to show that such venue is unreasonable. As the Court commented:

> In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practicable purposes be deprived of his day in Court. Absent that there is no basis for concluding that it would be unfair, unjust or unreasonable to hold that party to his bargain.

Id. at 18. Hence, *Bremen* imposes a heavy burden of proof on the party challenging a contractual forum selection clause to establish that enforcement of the clause is so unreasonable as to deprive a litigant of his opportunity to a fair trial. *See Burger King*, 471 U.S. at 478. Moreover, the federal circuits have overwhelmingly adopted *Bremen* and generally upheld the contractual designation of venue by parties.[9] *See LFC Lessors, Inc. v. Pacific Sewer*

[9]While petitioners' brief ignores the relevance of *Bremen* and the lower federal court decisions following *Bremen*, petitioners did attempt to distinguish the lower court cases below by arguing that subject matter jurisdiction in *Bremen* was based on the admiralty jurisdiction of the federal courts and on federal question jurisdiction in other lower court cases, while contending this case is premised on diversity jurisdiction. First of all, such (footnote 9 continued on next page)

Maintenance Corp., 739 F.2d 4 (1st Cir. 1984) (choice-of-venue provisions do not oust courts of jurisdiction); *Fireman's Fund American Insurance Cos. v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294 (1st Cir. 1974) (applied standard set out in *Bremen*); *AVC Nederland B.V. v. Atrium Investment Partnership*, 740 F.2d 148 (2d Cir. 1984) (*Bremen* followed in suit brought under Securities Exchange Act); *Bense v. Interstate Battery System of America, Inc.*, 683 F.2d 718 (2d Cir. 1982) (federal law governed enforceability of provision where jurisdiction premised on diversity and antitrust statutes); *Luce v. Edelstein*, 802 F.2d 49, 57 (2d Cir. 1986); *Bryant Electric Co., Inc. v. City of*

---

an argument is factually inaccurate, and secondly, it presents a classic example of a distinction without a difference. As mentioned above, the subject matter jurisdiction of this case is premised on *both* federal question and diversity jurisdiction, and given petitioners' antitrust claims, this case could only have been brought in federal court. Hence, petitioners' purported distinction is simply wrong factually.

More importantly, however, even assuming this case were a strict diversity case and the cases presented in *Bremen* and the other federal circuits where based on admiralty or federal question jurisdiction, such a distinction is completely irrelevant under *Erie* to the determination of whether federal or state law governs the enforceability of a contractual designation of venue. *Little Lake Misere Land Co., Inc.*, 412 U.S. at 591. Even in admiralty cases, this Court has periodically considered the *Erie* question of whether to apply state or federal law to a particular issue. *See, e.g., Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). In their brief to this Court, petitioners now seem to acknowledge the irrelevancy of their earlier purported distinction by noting that diversity and federal question cases stand on a similar footing for purposes of determining the applicable law governing forum selection clauses. Petitioners' Brief at 26-27. Hence, *Bremen* and the law in the lower federal courts is directly applicable to this case and is overwhelmingly supportive of the enforceability of a contractual designation of venue.

Fredricksburg, 762 F.2d 1192 (4th Cir. 1985) (*Bremen* followed in diversity case); *In Re Fireman's Fund Insurance Cos., Inc.*, 588 F.2d 93 (5th Cir. 1979) (*Bremen* standard applied in suit based on diversity and Miller Act); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984) (*Bremen* cited approvingly in upholding arbitration provision); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066 (8th Cir. 1986) (*Bremen* applied in admiralty and diversity case); *Northrop Corp. v. Triad International Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987) (citing *Bremen* approvingly in arbitration context); *Citro Florida, Inc. v. Citrovale, S.A.*, 760 F.2d 1231 (11th Cir. 1985) (choice- of-venue clause analyzed under *Bremen*); *but cf. General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3rd Cir. 1986) (*Bremen* applied as matter of state law); *Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848 (8th Cir. 1986).

Applying the *Bremen* analysis to this case, it is obvious that Stewart has failed to carry its heavy burden of proof to show clearly that trying its lawsuit against Ricoh in the United States District Court for the Southern District of New York would for all practical purposes deprive Stewart of its day in court. The only evidence Stewart has introduced at all in this case is the deposition testimony and affidavit of its President and Chief Executive Officer, Mr. Walter H. Stewart.

In his deposition testimony and affidavit, the only conceivable detriment Mr. Stewart ever even alleges with respect to bringing this lawsuit against Ricoh in New York is a self-serving declaration that he personally would be financially incapable of pursuing this action in New York because of the necessity of transporting witnesses and documents relevant to this

case to New York. (J.A. 44). Yet Mr. Stewart's professional status as a senior partner in a seven-man accounting firm and his abundant experience in a variety of successful business ventures all belie Mr. Stewart's hollow assention that he could not afford to pursue this action in New York.

Even more importantly, however, absolutely no evidence has been introduced by petitioners that The Stewart Organization is financially incapable of pursuing this action in New York. Since it is The Stewart Organization that is the party to the Dealer Sales Agreement, and therefore the real party in interest with respect to petitioners' claims, it is the financial capacity of The Stewart Organization, not Mr. Walter Stewart, that is relevant to this matter. Given the financial size of The Stewart Organization, as revealed by its *annual* sales figures of $1.5 to $2.0 million and its number of employees (*i.e.* 30), there can be no doubt but that The Stewart Organization is financially capable of pursuing this action in New York. (Stewart Depo. at 26, 64-65).

Hence, aside from Mr. Stewart's self-serving declaration regarding his personal financial capability, The Stewart Organization has failed to introduce any evidence whatsoever with respect to any detriment arising from pursuing this action in the Borough of Manhattan, New York City, New York. It has therefore utterly failed to carry its heavy burden of proof under *Bremen* to clearly establish that it would be deprived of its day in court if this action were heard by a court sitting in the Borough of Manhattan, New York City, New York. The facts developed establish the contrary.

Mr. Stewart possesses considerable business experience and acumen. After graduating in 1968

from the University of Alabama with a bachelor's degree in Accounting, he passed the exams necessary to become a Certified Public Accountant and worked for two years for what was then Haskins and Sells, a Big Eight accounting firm. In 1970, he started his own accounting firm in Birmingham, Alabama, and by the time he signed the Dealer Sales Agreement on behalf of The Stewart Organization, he had been a practicing accountant for fifteen years, and was a senior partner in a prestigious seven-man accounting firm known as Snow, Stewart, Hubbard & Cade. (Stewart Depo. at 8-9).

Aside from his extensive accounting experience, Mr. Stewart also possesses considerable entrepreneurial ability and spirit, having owned a number of highly successful businesses in addition to his accounting practice and The Stewart Organization. For approximately six years, Mr. Stewart and Mr. James S. Snow, Jr. each owned one-half of a metal fabricating business, which generated between $1,500,000 and $2,000,000 in sales and employed 65 persons at the time Mr. Stewart and Mr. Snow sold their controlling interest in 1981. (Stewart Depo. at 14- 16). In 1979, in addition to purchasing the predecessor of The Stewart Organization, Mr. Stewart and Mr. Snow also purchased one-half of a swimming pool construction business, and they held this business for approximately one year, during which time it had approximately $800,000 in sales. (Stewart Depo. at 17-18). In addition to these activities, Mr. Stewart has continued to remain active in the retail copier business through his ownership of The Stewart Organization, Inc., which sold the Panasonic line of copier products at the commencement of this suit in 1984. (Stewart Depo. at 62).

In short, Mr. Stewart's extensive accounting and business experience conclusively demonstrate he is not the hapless consumer petitioners have attempted to portray throughout this litigation. As Judge Johnson aptly noted in his panel opinion,

> Stewart is evidently a man afflicted with the Midas touch.
>
> • • •
>
> Mr. Stewart is savvy; his organization is large and successful . . . Mr. Stewart is not the Michigan dirt farmer in *Szukhent*.

Stewart, 779 F.2d at 644, 649-50. Mr. Stewart is a highly successful businessman fully capable of representing his own interests in business affairs.

Unable to establish that holding Stewart to his bargain would be unreasonable, petitioners attempt to use other language in *Bremen* to manufacture an alternative test for determining the enforceability of the contractual designation of venue in this case. Pet. Brief at 33-34. Petitioners contend the following language in *Bremen* creates an alternative test that focuses on the public policy *of the state* in which suit has been brought, regardless of the fact that petitioners chose to bring this suit in a federal forum:

> The Court of Appeals suggested that enforcement would be contrary to the public policy of the forum under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629 (1955), because of the prospect that the English courts would enforce the clauses of the towage contract purporting to exculpate Unterweser from liability for damages to the Chaparral. A

> contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy *of the forum* in which suit is brought, whether declared by statute or by judicial decision. *See, e.g., Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263, 94 L.Ed. 55, 70 S.Ct. 26 (1949).

Bremen, 407 U.S. at 15. (emphasis added). In interpreting this language, petitioners attempt to have the Court apply state law through the back door to determine the enforceability of a contractual designation of venue within the federal court system. Petitioners' effort must fail for several reasons.

First, and most obviously, petitioners have simply misread the above-quoted language in *Bremen*. This language speaks to the public policy "of the forum" in which suit is brought, not the public policy "of the forum state" in which suit is brought. Indeed, this language could not possibly have been meant to apply to a "forum state" because the "public policy" referred to in *Bremen* involved a question of whether to apply English law or U.S. law to determine the enforceability of an exculpatory clause. Therefore, since this action has been brought in a federal forum, the relevant public policy is the public policy articulated by federal law. In fact, the *Bremen* Court's citation to *Boyd* confirms that federal law is the applicable public policy, since *Boyd* addressed the issue of whether a forum selection clause in an employment agreement was sufficient to override the venue provisions of the Federal Employers Liability Act. The *Boyd* Court did not apply state law, as petitioners would have this Court do, but rather the Court decided as a matter of federal law that a forum selection clause could not abrogate the venue provisions of FELA. *Boyd*, 338 U.S. at 265.

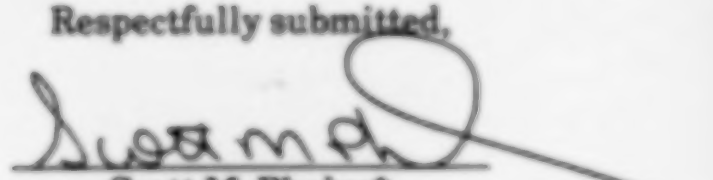
Moreover, the *Bremen* Court's citation to *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), further establishes that *Bremen* reflects a concern with whether the public policy "of the forum" would contravene a substantive policy of the contractual forum. *Bisso* addressed the issue of whether a forum selection clause should be enforced when the substantive tort law of the contractual forum would allow the defendant to avoid tort liability while the statutory forum would hold the defendant liable under its tort law. Hence, the Supreme Court's reference to *Bisso* reflects a concern with whether enforcement of the forum selection clause would contravene a significant *substantive* policy of the forum in which suit has been brought. In this case, due to both the choice-of-law clause contained in the parties' dealer agreement and this Court's *Van Dusen* decision, enforcement of the parties' contractual designation of venue would in no way affect the body of substantive law that would be applied to petitioners' claims. Hence, the "public policy" test articulated in *Bremen* does not even come into play.

Finally, it would simply be contradictory on its face to apply state law under the public policy prong of the *Bremen* analysis if one assumes that under an *Erie* analysis enforcing a contractual designation of venue is a procedural issue to be determined by federal law. The net effect of such an approach is that the Court would be holding the determination of this issue to be both a matter of federal law and a matter of state law. Obviously, such a result would be completely irrational. *See Benge v. Software Galeria, Inc.*, 608 F. Supp. 601, 608 (E.D. Mo. 1985).

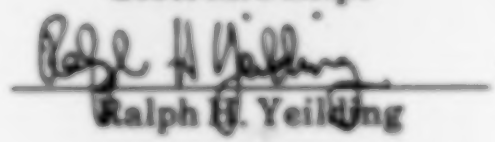
CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court affirm the United States Court of Appeals for the Eleventh Circuit, and order the district court to enter a judgment transferring this case to the Southern District of New York in accordance with the parties' contractual designation of venue.

Respectfully submitted,



Scott M. Phelps*



Ralph H. Yeilding

Counsel for Respondents
Ricoh Corporation and
Ricoh of America, Inc.

*Counsel of Record

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

January 4, 1988

REPLY

BRIEF

Supreme Court, U.S.
FILED
FEB 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1908

IN THE

Supreme Court Of The United States

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,

Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation.

Respondents

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF ON THE MERITS

JOSEPH W. LETZER
F. A. FLOWERS, III*
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Counsel for Petitioners

*Counsel of Record

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

QUESTION PRESENTED

Does state law or federal law govern the enforceability of a forum-selection clause in a contract between two private parties, when the state in which suit is filed has a strong public policy against the enforcement of such contractual provisions?*

---

*The alternative Question Presented contained in respondents' brief on the merits, like the Question Presented for Review contained in respondents' brief in opposition to the petition, was never articulated by either party in the court below. Moreover, respondents never asserted, at any time, or in any form or fashion, the § 1404(a) argument presented to this Court. In fact, respondents never even cited § 1404(a) in the court below in support of their position that federal law, rather than state law, governs the enforceability of a forum-selection clause in a contract between two private parties. Respondents' present § 1404(a) argument is an expansion upon Judge Tjoflat's concurring opinion in the court below, which was rejected by ten out of the thirteen judges hearing this case, and, as far as we can tell, has never been adopted by any federal court, not even the court below. Respondents' continuing attempt to shift the Court's focus away from the straightforward question presented above clearly demonstrates the inherent weakness of their arguments in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
I. Ricoh's Argument Is Fatally Flawed For Five Reasons.	2
II. Alabama Law, Rather Than New York Law, Governs The Enforceability Of The Forum-Selection Clause At Issue.	15
III. Even If Federal Law Governs The Enforceability Of The Forum-Selection Clause At Issue, The Clause Should Not Be Enforced For Two Separate And Independent Reasons.	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	*Page(s)*
Angel v. Bullington, 330 U.S. 183 (1947)	13, 14
Benge v. Software Galeria, Inc., 608 F. Supp. 601 (E.D. Mo. 1985)	18
Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1955)	3, 5, 16
Boyd v. Grand Trunk R.R. Co., 338 U.S. 263 (1949)	12, 18
Burger King Corp. v. Rudzewicz, 471 U.S. 472 (1985)	14
Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958)	3
Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)	4
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)	3, 11, 15
Commercial Cas. Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1928)	6
Condit Chemical & Grain Co. v. Helena Chemical Corp., 789 F.2d 1101 (5th Cir. 1986)	14
Conticommodity Services, Inc. v. TransAmerica Leasing, Inc., 473 So.2d 1053 (Ala. 1985)	16
Couch v. First Guaranty Ltd., 578 F. Supp. 331 (N.D. Tex. 1984)	19
Cutter v. Scott & Fetzer Co., 510 F. Supp. 905 (E.D. Wis. 1981)	19
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	*passim*
Griffin v. McCoach, 313 U.S. 498 (1941)	16
Guaranty Trust Co. v. York, 326 U.S. 99 (1945)	3, 4, 14
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	15
Hanna v. Plumer, 380 U.S. 460 (1965)	*passim*
Helvering v. Hallock, 309 U.S. 106 (1940)	11
Horning v. Sycom, 556 F. Supp. 819 (E.D. Ky. 1983)	19

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 3, 7, 14

Leroy v. Great Western United Corp., 443 U.S. 173 (1979) 6, 9

Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946) 13

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) ..... *passim*

National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) 6, 8, 9

Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U.S. 165 (1939) 6, 8, 13

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 10

Olberding v. Illinois Central R.R. Co., 346 U.S. 338 (1953) 9

Omni Capital Int'l v. Rudolf Wolff & Co., — U.S. —, 108 S.Ct. 404 (1987) 11, 17

Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924) 7, 10

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 10

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 4

Redwing Carriers, Inc. v. Foster, 382 So.2d 554 (Ala. 1980) 13, 14, 16

Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942) 9

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 12, 17

United States v. Burnison, 339 U.S. 87 (1950) 9

United States v. Little Lake Misere Land Co., Inc., 412 U.S. 580 (1973) 4, 9

United States v. Rumeley, 345 U.S. 41 (1953) 15

United States v. Scophony Corp., 333 U.S. 795 (1948) 12

Vance v. Campbell, 66 U.S. (1 Black) 427 (1861) 4

TABLE OF AUTHORITIES – (Continued)

Cases: *Page(s)*

Van Dusen v. Barrack, 376 U.S. 612 (1964) 10

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) ..... *passim*

Wheldin v. Wheeler, 373 U.S. 647 (1963) 12

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) 4

Wilson v. Garcia, 471 U.S. 261 (1985) 15

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 3, 14

Federal Statutes:

28 U.S.C. § 1391 9

28 U.S.C. § 1404(a) 10

28 U.S.C. § 1652 ..... *passim*

Alabama Statutes:

Ala. Code § 6-3-1 (1975) 16

Treatises:

H. Hart & H. Wechsler, *The Federal Courts and The Federal System* 435 (1953) 6

4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075, p. 310 n.51 (1969) 8

Articles:

Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) 18

No. 86-1908

IN THE

Supreme Court Of The United States

October Term, 1987

THE STEWART ORGANIZATION, INC., a corporation; WALTER H. STEWART, and JAMES S. SNOW, JR.,
Petitioners

vs.

RICOH CORPORATION, a corporation; RICOH OF AMERICA, INC., a corporation,
Respondents

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF ON THE MERITS

ARGUMENT IN REPLY

Ricoh engages in all sorts of strained legal and logical gymnastics, which simply do not ring true, in an attempt to convince the Court that federal law, rather than state law, governs the enforceability of contractual forum-selection clauses. Once Ricoh's arguments are examined closely, it becomes readily apparent that Ricoh has not provided the Court with any applicable facts or legal authority altering the conclusion and underlying reasoning set forth in our principal brief — Alabama law, rather than federal law or New York law, governs the enforceability of the forum-selection clause contained in the contract entered into between Ricoh and The Stewart Organization.

Consequently, having demonstrated that Alabama law governs, the judgment of the court below must be reversed.[1]

I. Ricoh's Argument Is Fatally Flawed For Five Reasons.

We demonstrated in our principal brief that Alabama law governs in this case for the following reasons: (a) application of the wholly judge-made federal rule fashioned by the court below would violate the "twin aims" of *Erie*; (b) there is no conflict between the federal venue statutes and Alabama's laws and policy against the enforcement of contractual forum-selection clauses; (c) since Alabama's policy against contractual forum-selection clauses is an adoption of the traditional common law rule and not in conflict with any federal law, the federal courts are required to apply Alabama law under the Rules of Decision Act and *Erie*; and (d) even if the enforcement of contractual forum-selection clauses involves a "procedural" question, which it does not, the issue is a matter for Congress to resolve, or possibly this Court under the Rules Enabling Act, not the federal courts of appeals. (Pet. Br. 17-30).

The thrust of Ricoh's argument is that, because the enforceability of a contractual forum-selection clause involves a "procedural" matter, federal law, including wholly judge-made federal law, necessarily governs. We will assume, for the purposes of this section of our brief only, that Alabama's policy against forum-selection clauses is a "procedural" matter. Nevertheless, Alabama law governs, as will be demonstrated below.

1. This Court has held repeatedly that the boundaries surrounding the power of the federal courts to make law cannot be plotted by the classification of rules as "substantive" or "procedural." *Walker v. Armco Steel Corp.*, 446 U.S. 740

[1]Ricoh refers to the contractual provision involved in this case as a "choice-of-venue" clause. (Resp. Br. 8). We will refer to the clause in issue as a "forum" selection clause because "forum" is the term used in the contract and the term used by the court below. (J.A. 38-39; Pet. App. 1-21). The Court should also note that the plurality in the court below did *not* rest their decision to transfer this action to New York on either § 1404(a) or § 1406(a), as Ricoh erroneously asserts. (Resp. Br. 4). The plurality's decision was based upon a wholly judge-made rule, totally independent of § 1404(a) and § 1406(a). (Pet. App. 1-21).

(1980); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). To the extent the terms "substantive" and "procedural" have any relevance, *Erie* established that the federal courts do not have the power to fashion "substantive" rules of decision in diversity cases. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Having put that issue to rest, the Court, after *Erie*, focused on state laws which were, in some sense, "procedural."[2]

It is now well settled under the "twin aims" of *Erie* that, unless the Constitution, a federal statute, rule, or policy otherwise provides or requires, or the Constitution or a federal law authorizes the courts to fashion rules of decision in an area, the federal courts are required to follow state "procedural" law, rather than fashioning a judge-made rule, when fashioning a judge-made rule would lead to forum-shopping by the prospective plaintiff between state and federal court. *Walker, supra; Hanna, supra.* Similarly, unless the Constitution, a federal statute, rule, or policy otherwise provides or requires, the federal courts are required to apply state "procedural" law, when fashioning a judge-made rule would result in the inequitable administration of the law of the state. *Walker, supra; Hanna, supra.*

Again, because the federal courts do not have the authority or power to fashion "substantive" law in diversity cases, the "twin aims" of *Erie* analysis necessarily applies to laws which are, in some sense, "procedural." Hence, labels and classifications are not controlling. Ricoh, however, quotes, totally out of context, certain language in Justice Reed's concurring opinion in *Erie*; certain language in the Court's opinion in *Hanna*;

[2]*Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (state choice-of-law rules); *York, supra* (state statutes of limitations); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (New Jersey's security for costs statute); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (Mississippi's "door closing statute"); *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1955) (enforceability of arbitration clauses); *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958) (whether a judge or jury should decide factual issue); *Hanna v. Plumer, supra* (Massachusetts' service-of-process statute); *Walker v. Armco Steel Corp., supra* (Oklahoma's service-of-process statute).

and language in numerous other cases, and then argues "procedural, ergo federal." Ricoh's argument simply stops short of, and then jumps over, the crucial "twin aims" of *Erie* analysis.[3]

Doing its best to dodge the "twin aims" of *Erie,* Ricoh also places great weight on the rigid "outcome-determinative" test set forth in *York, supra.* Ricoh fails to understand, however, that the rigid "outcome-determinative" test of *York* is no longer the exclusive test under the *Erie* doctrine. As the Court discussed at length in *Hanna v. Plumer, supra,* the focus, in a case such as this one, is not necessarily on who will ultimately prevail at the conclusion of the lawsuit:

> The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point "outcome-determinative" in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense *every* procedural variation is "outcome-determinative." For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. . . . 380 U.S. at 468-469 (emphasis added).

The Court in *Hanna* then went on to discuss the "twin aims" of *Erie*: discouragement of forum-shopping and avoidance of the inequitable administration of the laws. The Court found that neither of these two policies would be transgressed

[3]The *Erie* doctrine also applies, whatever the ground of jurisdiction, to issues and claims which do not have their origin in federal law. *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 591 (1973). Indeed, even before *Erie,* the Court applied the Rules of Decision Act, when appropriate, in federal question cases, *Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906); *Vance v. Campbell,* 66 U.S. (1 Black) 427 (1861), and has applied state law in admiralty cases, although it was not required to do so. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 314 & 320 (1955); *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 409-10 (1953). Of course, Alabama's policy against forum-selection clauses has "no federal origin." *Guaranty Trust Co. v. York,* 326 U.S. at 112.

if the federal procedural rule was applied in the case before it. 380 U.S. at 469. (Pet. Br. 14-15).

Doing its best, once again, to dodge the "twin aims" of *Erie,* Ricoh argues that litigants forum shop on a regular basis. Ricoh's argument on this point, however, is wide of the mark. What the "twin aims" of *Erie* prohibit is forum-shopping based on wholly judge-made federal law, not forum-shopping on the basis of a federal statute or federal rule. Forum-shopping based on "differing rules of discovery, rules of evidence, standards for summary judgment, etc." (Resp. Br. 28-29), is not prohibited by the *Erie* doctrine. What is prohibited is forum-shopping based on wholly judge-made rules like the one manufactured by the court below.

Ricoh's discussion of the second policy underlying the *Erie* doctrine — the avoidance of inequitable administration of the laws — is similarly flawed. Again, a federal court can apply federal law, or even fashion federal law, when the Constitution, a federal statute, or rule provides the authority for the court to do so. What *Erie* and its progeny prohibit is the application of a wholly judge-made federal rule over a state law governing the same issue, when there is no authority to fashion a wholly judge-made rule, and when the result would be an inequitable administration of the law of the state. *See Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198 (1955) (Vermont policy against arbitration clauses applied in federal court under *Erie*).

When all the smoke blown by Ricoh is cleared, the fact remains that the decision by the court below is in direct conflict with the "twin aims" of *Erie.* As we demonstrated in our principal brief, the judge-made rule manufactured by the court below will lead to forum-shopping and to the inequitable administration of the law in coordinate state and federal courts sitting side by side. (Pet. Br. 17-21). Consequently, the court's judgment must be reversed.

2. Ricoh's next argument is that "the state policy posited by petitioners in this case, if given effect, would directly collide with specific federal venue enactments." (Resp. Br. 17). Yet,

Ricoh does not point to any particular federal venue statute or rule which even remotely addresses the enforceability of contractual forum-selection clauses.

Venue is a "personal privilege" of the "*defendant.*" *Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-84 (1979) (emphasis in original); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (same); *Commercial Cas. Ins. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 179 (1929) (same). The venue statutes simply do not address the question when or under what circumstances a *plaintiff* is precluded from selecting a forum because of a forum-selection clause in a contract, executed before suit is filed, limiting the plaintiff's right to choose the forum.

Indeed, a plaintiff can bring suit in any district, and the suit can be heard in the district chosen by the plaintiff, unless the defendant objects. *Commercial Cas. Ins. Co. v. Consolidated Stone Co., supra; Panama R.R. Co. v. Johnson*, 264 U.S. 375, 383-85 (1924). The federal venue statutes simply do not address the question presented by this case. *Cf. Leroy v. Great Western United Corp.*, 443 U.S. at 184 n.17 ("The statute simply does not contemplate such a choice on the part of plaintiffs"). Accordingly, there being no federal law governing the enforceability of contractual forum-selection clauses, the Rules of Decision Act, 28 U.S.C. § 1652, and *Erie* "command the enforcement of state law." *Hanna v. Plumer*, 380 U.S. at 470-72.

State law applies in this case for an additional reason. As Professors Hart and Wechsler stated, "Congress acts against the background of the total *corpus juris* of the states in a manner the way a state legislature acts against the background of the common law, assumed to govern unless changed by legislation." H. Hart & H. Wechsler, *The Federal Courts and The Federal System* 435 (1953). There could be no better example of this principle than the Rules of Decision Act itself.

Like the federal venue statutes, none of the decisions of this Court relied upon by Ricoh, including *The Bremen* and *Szukhent*, treat the issue involved in this case as a question of "venue." Nor do any of this Court's decisions state, even in dicta, that the venue statutes express a policy in favor of forum-

selection clauses. Finally, none of this Court's decisions hold that federal law, rather than state law, governs the enforceability of contractual forum-selection clauses in non-admiralty cases.

In *The Bremen*, for example, the Court did not decide whether state law or federal law governs the enforceability of contractual forum-selection clauses in non-admiralty cases brought in the federal courts. Indeed, the Court expressly limited its holding to the area of admiralty: "We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty." 407 U.S. at 11. Of course, admiralty is an area of the law in which the federal courts have the power to be, and have been, the primary agent in developing the law. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385-87 (1924).

Moreover, in *The Bremen*, the Court recognized that "[n]o one seriously contends in this case that the forum-selection clause 'ousted' the District Court of jurisdiction over Zapata's action." 407 U.S. at 12. Nevertheless, the Court framed the issue in terms of contract law, not venue: whether the district court should have "give[n] effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement." *Id.* The Court, sitting in admiralty, enforced the clause in accordance with "ancient concepts of freedom of contract," independent of the federal venue statutes and rules governing admiralty cases. *Id.* at 10-13.

It makes no sense to analyze the enforceability of forum-selection clauses in admiralty cases in terms of contract law, but to analyze the enforceability of forum-selection clauses in non-admiralty cases in terms of venue. Yet, that is what Ricoh asks the Court to do. The more coherent approach would be to analyze forum-selection clauses in terms of contract law in all cases, which is the approach taken by a majority of the courts of appeals. (Reply Br. on Cert. 2-3).[4]

---

[4]Forum-selection clauses are also often found, as in this case, with choice-of-law clauses, the enforceability of which is governed by state law. *Klaxon, supra.* To hold that forum-selection clauses should be governed by federal law, rather than state law, creates a confusing anomaly. This is particularly true in this case because the contractual provision at issue speaks of "any appropriate *state* or federal district court located in the Borough of Manhattan, New York City, New York." (J.A. 38-39). What

The Court's decision in *Szukhent* is not to the contrary. In *Szukhent,* "[t]he only question now before us," the Court said, "is whether [Florence Weinberg] upon whom the summons and complaint were served was 'an agent authorized by appointment' [within the meaning of Rule 4(d) (1), Fed.R.Civ.P.] to receive the same." 375 U.S. at 313. The defendants "were not acquainted with Florence Weinberg," and Mrs. Weinberg was apparently, unknown to the defendants, "related to an officer of the [plaintiff] corporation." 375 U.S. at 313 & 316.

The Court, after considering these facts, simply interpreted a phrase in a federal rule: "agent authorized by appointment." Rule 4, Fed.R.Civ.P. The Court held as follows: "We hold only that, prompt notice to the respondents having been given, Florence Weinberg was their 'agent authorized by appointment' to receive process within the meaning of Federal Rule of Civil Procedure 4(d) (1)." 375 U.S. at 318. The Court, after stating that "[n]o questions of subject-matter jurisdiction or of venue are presented, 375 U.S. at 313 n.2, based its interpretation of Rule 4 on "well-settled general principles of the law of agency." 375 U.S. at 316, *citing,* 2 *Williston on Contracts* § 274 (3d ed. 1959).

While the Court in *Szukhent* noted the trend in favor of enforcing consent to *in personam* jurisdiction provisions [not exclusive forum-selection clauses], the Court did not speak in terms of venue, and the Court did not decide whether contractual forum-selection clauses are governed by state law or federal law. *Id.* at 315-16; 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075, p. 310 n.51 (1969). The issue was simply not before the Court. 375 U.S. at 313. *See also Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 278 U.S. 165, 167 (1939) (whether service of process upon an agent of a foreign corporation, designated pursuant to a New York statute, constituted service of process upon the foreign corporation in federal court).

---

power does a federal court possess to apply federal law to this aspect of the contract? Again, "the more coherent approach would be to apply state law to the entire contract." (Pet. App. 39) (Godbold, C. J. dissenting).

Recognizing that the federal venue statutes, *The Bremen* and *Szukhent* do not resolve the issue presented by this case, Ricoh then asserts that Alabama's laws and policy against forum-selection clauses are in conflict with the "federal interest" embodied in the federal venue statutes. (Resp. Br. 13). Yet, Ricoh does not state what exactly this "federal interest" is. Furthermore, Ricoh fails to understand that venue "is not one of those vague principles which, in the interest of some overriding policy, is to be given a liberal construction." *Leroy,* 443 U.S. at 184, *quoting, Olberding v. Illinois Central R.R. Co.,* 346 U.S. 338, 340 (1953).

What Ricoh really asks the Court to do in this case is to oust state law on the basis of " 'an amorphous doctrine of national sovereignty' divorced from any specific constitutional or statutory provision" specifying that federal law "require[s] otherwise than that state law govern." *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 592-93 n.10 (1973), *quoting, United States v. Burnison,* 339 U.S. 87, 91 (1950). Such a vague and ill-defined interest, however, is not sufficient to justify displacing state law. *Id.* In this case, we are simply not confronted with any federal statute, rule, or policy favoring forum-selection clauses enacted or adopted pursuant to Congressional power to establish an independent judicial system. *Compare Sola Elec. Co. v. Jefferson Elec. Co.,* 317 U.S. 173, 177 (1942) (local law was in conflict with express provisions of the Sherman Act and the "public policy of the Act" as stated by Congress).

In fact, Ricoh's argument is fatally flawed on a more basic level. This case is really not about venue at all, or which court is suitable. *This case is about a contractual provision choosing between suitable courts.* The venue statutes are fully vindicated. Venue is appropriate in both Alabama and New York. 28 U.S.C. § 1391. The issue is whether a federal court should give effect to a forum-selection clause in a contract between two private parties, as a matter of federal law, when: (1) no federal law or policy answers the question; and (2) the state in which suit is filed has a strong public policy against the enforcement of such contractual provisions. The answer is clear:

Under the Rules of Decision Act and *Erie*, when no provision in the Constitution, a treaty, or a federal statute or rule otherwise requires or provides, and there is no such provision in this case, the federal courts must use rules drawn from state law. 28 U.S.C. § 1652. The court below was wrong in concluding otherwise.

Finally, a federal district court, contrary to Ricoh's assertion, can enforce state law and policy against forum-selection clauses and still, independent of state law, transfer the case when it is for "the convenience of parties and witnesses." 28 U.S.C. § 1404(a). These are two different questions, and this is precisely the analysis used by the district court in this case. The court refused to give effect to the forum-selection clause, and then held, pursuant to § 1404(a), and based upon the evidence presented by the parties, that "an Alabama forum is no less convenient to the parties than a New York forum, and perhaps more convenient." (Pet. App. 42). Of course, a court ruling on a § 1404(a) motion has broad discretion in deciding whether to transfer the case. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981); *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955). It is for this reason that the Court's decision in *Walker, supra*, which Ricoh does not even address, rather than the Court's decision in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), governs this case.

To summarize, the scope of the federal venue statutes are not "sufficiently broad" to cause a "direct collision" with Alabama's laws and policy against contractual forum-selection clauses, and the federal venue statutes do not otherwise displace the "policy determinations found in state law." *Walker*, 446 U.S. at 749-50 & 752. Nor do the venue statutes, when given their "plain meaning," "control the issue" before the Court, thereby leaving no room for the operation of state law. *Id.*

The federal venue statutes and Alabama's policy against forum-selection clauses "can exist side by side, each controlling its own intended sphere of coverage without conflict." *Walker*, 446 U.S. at 752 (Oklahoma's service-of-process statute and Rule 3, Fed.R.Civ.P., both applied in federal court because there was

no conflict); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 556 (1949) (New Jersey security-for-costs statute and Rule 23, Fed.R.Civ.P., governing stockholder derivative actions both applied in federal court because there was no conflict). The court below held the opposite. Its judgment, therefore, should be reversed.

3. The judgment of the court below should be reversed for an additional reason. Because Congress has not expressed a policy regarding contractual forum-selection clauses, in the venue statutes or otherwise, it would be inappropriate for the Court to fashion a rule in favor of forum-selection clauses, even assuming it had the power to do so. Far from asking the Court merely to "fill in a gap" in the venue statutes, Ricoh asks the Court to guess what Congress would have intended on an issue not presented to it, if the issue had been presented. As the Court has recognized, however, the courts "walk on quicksand when they try to find in the absence of . . . legislation a controlling legal principle." *Helvering v. Hallock*, 390 U.S. 106, 121 (1940).

The reason why fashioning a policy regarding forum-selection clauses should be left to Congress, under the commerce clause, for example, can be illustrated by the Court's decision in *Omni Capital Int'l v. Rudolph Wolff & Co.*, ___ U.S. ___, 108 S.Ct. 404 (1987), a federal question case involving a federal "procedural" issue decided earlier this term. In *Omni*, the Court held, in a unanimous opinion, that: (1) there was no implied authorization for nationwide service of process under the Commodities Exchange Act; and (2) the requirements of the Louisiana long-arm statute were not met. In *Omni*, the Court rejected the request that, even though authorization for service of process (a procedural matter) "cannot be found in a [federal] statute or rule," such authorization "should be created by fashioning a [judge-made] remedy *'to fill a gap'* in the Federal Rules of Civil Procedure." 108 S.Ct. at 409. In declining to do so, the Court stated as follows:

> The dissenters in the Court of Appeals argued that even if authorization to serve process is necessary and cannot be

found in Rule 4(e), the federal courts should act to fill "the interstices in the law inadvertently left by legislative enactment" by creating their own [procedural] rule authorizing service of process in this litigation. We decline to embark on this adventure.

* * *

We are not blind to the consequences of the inability to serve process on Wolff and Gourlay. A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. *It is not for the federal courts, however, to create such a rule as a matter of common law.* That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress. 108 S.Ct. at 411-13 (emphasis added).

See also Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) (whether there should be a right to contribution in antitrust cases "is a matter for Congress, not the courts, to resolve"); *Hanna v. Plumer*, 380 U.S. at 473 ("Erie and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts"); *Wheldin v. Wheeler*, 373 U.S. 647, 652 (1963) (federal question case: "it is not for us to fill any hiatus Congress has left in this area").[5]

[5]The danger of trying to divine Congressional intent from silence can be demonstrated further by Ricoh's argument in favor of forum-selection clauses, which is arguably in direct conflict with the venue provisions of the antitrust laws. Congress has expressed a policy in favor of broad venue provisions applicable to antitrust cases. 15 U.S.C. § 22. Under this statute, Congress "relieved persons injured through corporate violations of the antitrust laws from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence." *United States v. Scophony Corp.*, 333 U.S. 795, 808 (1948). To hold, as a *per se* rule, that forum-selection clauses are enforceable in antitrust actions, as Ricoh asks this Court to do, would be in direct conflict with this clear Congressional policy. *Cf. Boyd v. Grand Trunk R.R. Co.*, 338 U.S. 263, 266 (1949) (forum-selection clause void as being contrary to public policy and purpose expressed in the Federal Employer's Liability Act: "The right to select the forum granted in § 6 is a substantial right. It would thwart the express purpose of the [Act] to sanction defeat of that right by the device at bar").

In this case, should the Court not wish to base its holding exclusively on the Rules of Decision Act and *Erie*, the Court should hold that, because Congress has neither directly addressed nor provided any guidance on the question of the enforceability of contractual forum-selection clauses, the question is best resolved by Congress, not the federal courts. This seems to be a better course than fashioning a wholly judge-made rule without any guidance from Congress, which is precisely what the court below did.

4. Ricoh's next argument is that the Alabama Supreme Court's decision in *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala. 1980), which is not predicated upon Alabama's venue statute, does not apply in federal court because the policy, "by its terms, is intended to apply only to the state courts of Alabama." (Resp. Br. 35). This Court, in four separate decisions, including two decisions relied upon by Ricoh, has already rejected Ricoh's argument.

In *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), a case relied upon by Ricoh, the Court disposed of an argument similar to the one made by Ricoh in this case:

> The answer to the suggestion that the consent to suit in the state [by the defendant corporation] is a consent to suit only in the state courts and subject to state statutes regulating venue in those courts is plain. Such consent has been uniformly construed to mean suits within the state which apply the law of the state, whether they be state or federal courts. 326 U.S. at 443.

See also Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 175 (1939) (corporation consented to be sued in the federal court by consenting to be sued, pursuant to a state statute, in "the courts of New York")

The Court reached a similar result in *Angel v. Bullington*, 330 U.S. 183 (1947). In *Angel v. Bullington*, the Court expressly held, after a lengthy discussion of the issue, that a North Carolina statute disallowing deficiency judgments, which was construed by the North Carolina Supreme Court to be *"a limitation on the jurisdiction of the courts of this state,"* was applicable in federal court under *Erie*. 330 U.S. at 188 & 191-92.

See also Woods v. Interstate Realty Co., 337 U.S. 535, 536 n.1 (1949) (Mississippi statute prohibiting foreign corporations not qualified to do business in the state from bringing or maintaining an action in "any of the courts of this state" was binding on federal courts in Mississippi under *Erie*).

In light of these four decisions, it is clear that Alabama's policy against the enforcement of contractual forum-selection clauses applies in federal court under *Erie*. This is true even though the Alabama Supreme Court spoke in terms of forum-selection clauses limiting "the jurisdiction of the courts of this state." *Redwing Carriers*, 382 So.2d at 556. *Compare Angel v. Bullington, supra.*

While the court below and others may disagree with the Alabama Supreme Court's policy and "ouster" rationale, Alabama has "the right to pursue local policies diverging from those of its neighbors," whether or not its policies and underlying rationale commend themselves to a federal court. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). The policy of *Erie*, "so important to our federalism, must be kept free from entanglements with analytical or terminological niceties" such as "substance," "procedure," and "jurisdiction." *Guaranty Trust Co. v. York*, 326 U.S. at 110.[6]

Moreover, the effect of the common law approach and Alabama's policy against forum-selection clauses is that Alabama's citizens are guaranteed a local forum in which to resolve their disputes, regardless of a contractual provision to the contrary. As the Court expressly recognized in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), "[a] State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out of state actors." 471 U.S.

[6]Simply because Alabama's statutory law against enforcement of forum-selection clauses, which was not the basis for the court's decision in *Redwing Carriers, supra*, is codified in the venue section of the Alabama Code does not dictate it has no application in the federal courts. *Condit Chemical & Grain Co. v. Helena Chemical Corp.*, 789 F.2d 1101, 1102-03 (5th Cir. 1986). Otherwise, mere nomenclature and rigid classifications, rather than the policies underlying the *Erie* doctrine, would control. The Court has consistently refused to sanction such a result.

at 473. *See also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (same).

In addition, Alabama's policy has significant effects on out-of-state citizens as well, as this case clearly demonstrates. Ricoh and the court below, however, have focused on mere nomenclature, rather than the effect of Alabama's policy, and have become "blind" to what "[a]ll others can see and understand." *United States v. Rumeley*, 345 U.S. 41, 44 (1953). Alabama's policy is simply not limited to mere "details related to its own conduct of business." *Cohen*, 337 U.S. at 555. Therefore, in the absence of a contrary federal law or policy, and there is none, Alabama's policy must be applied in federal court under the Rules of Decision Act and *Erie*.

5. Ricoh finally argues, inexplicably, that Alabama's policy against forum-selection clauses should not bind a federal court. Ricoh's argument is the reappearance of the ghost of *Swift v. Tyson*, albeit shrunken in size. State law always binds a federal court *each and every time* the Rules of Decision Act and *Erie* are given effect by a federal court.

In this case, Ricoh's quarrel is actually a quarrel with our founding fathers, by whom the fundamental demarcations of federal and state power, including the limits on federal judicial power, were hammered out in essentially their present form. Indeed, as Justice O'Connor has recognized, "the call for 'uniformity' is not so much grounded in any practical necessity as in a desire for symmetry of abstract legal principles and a revolt against the complexities of a federated system." *Wilson v. Garcia*, 471 U.S. 261, 287 (1985) (O'Connor, J., dissenting). Ricoh's revolt, like the revolt by the court below, must be rejected.

II. Alabama Law, Rather Than New York Law, Governs The Enforceability Of The Forum-Selection Clause At Issue.

We demonstrated in our principal brief that Alabama law, rather than New York law, governs the enforceability of the forum-selection clause at issue in this case. (Pet. Br. 30-32).

Contrary to Ricoh's assertion, Alabama's policy against the enforcement of contractual forum-selection clauses is not merely "ostensibly violative of public policy." (Resp. Br. 36). Alabama's strong public policy against the enforcement of contractual forum-selection clauses has been part of the law of Alabama since 1852, *Ala. Code* § 6-3-1 (1975), and the Alabama Supreme Court has already ruled on this issue. The court has expressly held, twice in the last eight years, that such clauses are simply not enforceable. *Redwing Carriers, Inc. v. Foster, supra; Conticommodity Services, Inc. v. TransAmerica Leasing, Inc.*, 473 So.2d 1053 (Ala. 1985) (*Redwing Carriers* reaffirmed).

Of course, "[i]t is for the state to say whether a contract contrary to a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement." *Griffin v. McCoach*, 313 U.S. 498, 507 (1941). And, if "a state will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to . . . or violative of the public policy of the state where the enforcement of the foreign contract is sought," a federal court sitting in the state must do likewise. *Griffin v. McCoach*, 313 U.S. at 506. Ricoh has not provided the Court with any authority to the contrary.

In this case, therefore, because the Alabama courts, the court below, and the courts of New York would not apply New York law to override the strong public policy of Alabama, Alabama law, rather than New York law, governs the enforceability of the forum-selection clause at issue. (Pet. Br. 30-32).[7]

---

[7]The Court should decide whether Alabama law or New York law applies in this case, rather than remanding the case to the court below for a disposition of this issue, because: (1) the district court correctly held that Alabama law governs (Pet. App. 42-43); and (2) "there is no confusion in [either the Alabama or New York] decisions, no developing line of authorities that casts a shadow on the established ones, no dicta, doubts or ambiguities in the opinions of [either the Alabama or New York] judges on the question, no legislative development that promises to undermine the judicial rule." *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 205 (1955).

III. Even If Federal Law Governs The Enforceability Of The Forum-Selection Clause At Issue, The Clause Should Not Be Enforced For Two Separate And Independent Reasons.

Assuming, for the purposes of argument only, that federal law governs the enforceability of the forum-selection clause at issue in this case, the clause nevertheless should not be enforced. This is true for two separate and independent reasons.

1. First, under this Court's decision in *The Bremen*, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." 407 U.S. at 15. In this case, which is not an admiralty case, Ricoh argues that the "forum" is the federal district court and that "the relevant public policy is the public policy articulated by federal law," not the public policy of the forum state. (Resp. Br. 45). Yet, outside the area of admiralty, there is no federal public policy regarding forum-selection clauses. Neither Congress nor this Court, outside of admiralty, has expressed a public policy regarding forum-selection clauses.

Once again, what Ricoh asks this Court to do is to create a judge-made rule in favor of forum-selection clauses, as did the court below. The Court should "decline to embark on this adventure." *Omni*, 108 S.Ct. at 412. To do so would violate the *Erie* doctrine and, in addition, force the Court to make a decision better left to Congress. *See Omni, supra; Texas Industries, supra.*

Moreover, Ricoh fails to understand that *The Bremen* arose in a completely different factual and legal context than this case. *The Bremen* involved an international admiralty dispute between companies of two nations — the United States and Germany. In discussing the "public policy" exception in *The Bremen*, the Court was concerned with the question whether the public policy of the United States would be violated by transferring the case to London, England. 407 U.S. at 15-16. The Court held that enforcement of the clause would not be

contrary to the laws and policy of the United States. *Id. Compare Boyd v. Grand Trunk R.R. Co.*, 338 U.S. 263, 265-66 (1949) (forum-selection clause void as being contrary to the public policy and the "substantial right to select the forum" expressed in § 6 of the Federal Employer's Liability Act).

Numerous federal courts, in analyzing the enforceability of forum-selection clauses, have consistently held that a federal court, not sitting in admiralty, should decline to enforce a forum-selection clause if enforcement would contravene a strong public policy of the state in which suit is brought. (Pet. Br. 33-34). This is true even of the court's decision in *Benge v. Software Galeria, Inc.*, 608 F. Supp. 601 (E.D. Mo. 1985), relied upon by Ricoh on page 46 of its brief. In *Benge*, while the court did enforce the forum-selection clause, it expressly recognized that "enforcement of the forum selection clause in this case would not contravene a strong public policy of Missouri." 608 F. Supp. at 608.

The Court should give the "public policy" exception articulated in *The Bremen* the only possible correct interpretation in this context – the forum-selection clause should not be enforced because to do so would contravene a strong public policy of Alabama. This holding is the only one consistent with our system of federalism, in which "federal law is still a largely interstitial product, building normally upon legal relationships established by the states." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 545 (1954). Under Ricoh's view, on the other hand, the "public policy" exception is given no effect at all.

2. Second, the forum-selection clause involved in this case should not be enforced because the clause was not bargained for; its existence was never revealed to Mr. Stewart; and it is simply a part of a standard-form contract of adhesion. (J.A. 43-44; Stewart Deposition, Def. Ex. #2). There were no negotiations whatsoever regarding the language of the contract, and when Mr. Stewart objected to the termination provision on the first page of the contract, Ricoh's representative told Mr. Stewart that "this was the only contract" and that "it could not be altered in any way." (J.A. 43; Stewart Deposition, p. 70).

In short, this contract was given to Mr. Stewart on a take-it-or-leave-it basis, and just because Mr. Stewart could have walked away from the deal is irrelevant – that is true of all contracts of adhesion. In *The Bremen*, on the other hand, the contract "was not simply a form contract with boilerplate language that Zapata had no power to alter." 407 U.S. at 12 n.14. In fact, Zapata made suggestions for changes which were agreed to by the German corporation. *Id.* at 3. This is not such a case. (J.A. 43).

As Chief Judge Godbold recognized, "the use of boilerplate choice-of-forum clauses to require the unsuspecting to litigate in a distant forum is a sharp practice that has been widely criticized." (Pet. App. 41).[8] Indeed, it is common knowledge that large corporations such as Ricoh include forum-selection clauses in standard-form contracts such as this one to make it as burdensome, disadvantageous and expensive as possible for their dealers and customers to litigate against them. This oppressive practice is the reality of this case and numerous others which the Court should keep in mind in rendering its decision in this case, should it hold that federal law governs, which does not.[9]

---

[8] *See, e.g., Couch v. First Guaranty Ltd.*, 578 F. Supp. 331, 333 (N.D. Tex. 1984) (clause not enforced: "That the provision is *knowingly* inserted in the contract seems to be the underpinning of *The Bremen* decision, and the antithesis of the situation here" – "an obscure clause in a form contract"); *Horning v. Sycom*, 556 F. Supp. 819, 821 (E.D. Ky. 1983) (refusing to enforce forum-selection clause that was "only one of many clauses in the form contract that together represent the best job of boilerplating since the building of the Monitor"); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905, 908 (E.D. Wis. 1981) (clause not enforced on facts remarkedly similar to the facts of this case).

[9] The district court never reached the question whether the forum-selection clause should be enforced under *The Bremen* standard because it held, correctly, we believe, that Alabama law governed. (Pet. App. 42-43). Should the Court disagree, however, and hold that *The Bremen* standard governs, the case should be remanded to the district court for factual findings on the enforceability of the clause.

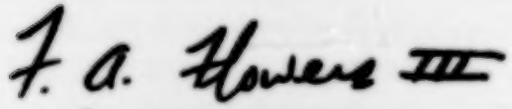
CONCLUSION

For the foregoing reasons, and for the reasons stated in our principal brief, the Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit, and remand the case to the court of appeals with directions to enter a judgment affirming the order of the district court entered herein on January 29, 1985.

Respectfully submitted,



Joseph W. Letzer



F. A. Flowers, III*

Counsel for Petitioners,
The Stewart Organization,
Inc.; Walter H. Stewart, and
James S. Snow, Jr.

**Counsel of Record*

OF COUNSEL:

BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

February 3, 1988